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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 17, Original

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THE STATE OF MINNESOTA

BRIEF FOR THE UNITED STATES

I

NATURE AND PURPOSES OF THE SUIT

The subject matter of this suit comprises about 153,524 acres of land which have been patented by the United States to the State of Minnesota as swamp lands. No issue is raised as to their character as swamp lands, but the United States claims that these particular lands were not subject to the swamp-land grant made to Minnesota; that at the time the patents issued these lands were held in trust by the United States to be sold for the benefit of the Chippewa Indians; and that the patents were issued to the State by the Interior

Department without authority of law and in violation of the trust.

The purpose of the suit is to have these patents declared invalid, and to have the possession of the lands restored, so far as may be, to the United States in order that they may be disposed of in accordance with the trust. But a large proportion of the tracts involved have been sold by the State to private parties, mostly, no doubt, to citizens of Minnesota, who probably could not be joined as parties defendant here without ousting the original jurisdiction of the court. *California* v. *Southern Pacific Co.*, 157 U. S. 229. In any event, the purpose of the trust was to turn the lands into cash for the Indians, and as that would be fully accomplished by recovering from the State the value of the lands already disposed of by her, that course has been pursued so as to avoid unnecessary complications and harassment of the private claimants. A decree against the State for the value of such lands will doubtless operate to confirm the claims of the private holders thereof. So that our main prayers are for the restoration of the lands still unsold by the State and a money decree against her for the value of the lands she has sold. We pray also for the value of timber cut and sold by the State from lands still unsold.

One fact of importance not known to the Government when the bill was prepared, but disclosed by the answer, is that the State in selling the

swamp lands reserved all minerals and mineral rights therein. (Exhibit B to Answer, R. 72.) If the Government shall prevail on its main contentions, these reserved minerals and mineral rights should be decreed to the United States, together with any sums realized from minerals mined and disposed of by the State pursuant to such reservations.

Under the terms of the trust the swamp lands belonged to a class which were to be disposed of by the United States for a fixed price of $1.25 per acre. But as to both lands and timber sold, the underlying theory of the bill is that the State, having gained possession without any right whatever and without any consideration, must restore to the trust fund, at the election of the Government, either the values of the lands or all that she has realized from them, which was in fact much more than $1.25 per acre.

If the court on this submission shall decide the questions of right in favor of the United States, either wholly or in part, then further proceedings are contemplated, for the parties have deemed it unjustifiable to go to the great expense necessary to ascertain quantities, values, and other details in advance of a decision on the questions of right.

II

OUTLINE OF FACTS AND CONTENTIONS

In 1855 certain bands of the Chippewa Indians ceded to the United States some 15,000,000 acres

of land in Minnesota Territory, retaining nine small, scattered reservations. In 1858 Minnesota was admitted to statehood, and in 1860 the Swamp Land Grant of 1850 was extended to her with modifications and exceptions. The small reservations proved inadequate to the Indian needs, and by treaties of 1863 and 1867 six of them were ceded and two large reservations were created out of territory ceded in 1855. For brevity we herein call the first of these the Enlarged Leech Lake Reservation. The second was the White Earth Reservation. The lands thus again reserved had remained wholly unsurveyed and unsettled, and the Indians had always been permitted to hunt and roam over them as before the cession of 1855.

These reservations remained unchanged for twenty-two years, when, by the Nelson Act of 1889 (25 Stat. 642), specific propositions were made to the Chippewas for the general settlement of their affairs, which propositions were to become binding when accepted in a manner prescribed. After prolonged negotiations they were so accepted.

Under this Act the Indians ceded the entire Leech Lake Reservation and a portion of the White Earth, together with other reservations in whole or in part. The Act prescribed that the ceded lands should be surveyed and then divided into two classes (only)—"pine lands" and "agricultural lands." All not found to be "pine lands" were to be classed as "agricultural lands."

The "pine lands" were to be sold at auction, and the "agricultural lands" were to be disposed of according to the procedure of the homestead laws for $1.25 per acre, all the proceeds of both classes to be placed to the credit of the Indian tribe. The surveyors, however, pursuing routine methods, segregated and described the swamp lands as such, instead of simply classifying them as pine or agricultural lands, as the Act of Cession contemplated.

During all these transactions the State remained wholly silent and, until after the Nelson Act was accepted, it had never been suggested by white man or Indian that the State could claim any of the ceded lands under the swamp-land grant. Some time after the surveys, however, the State presented to the Secretary of the Interior claims for the swamp lands not only in the ceded areas but also in the unceded part of the White Earth Reservation, and both claims were finally allowed.

These claims were made and allowed substantially on these grounds:

That the swamp-land grant was a grant *in praesenti* passing an immediate title or vested right to the State as of March 12, 1860; that at that time the lands ceded in 1855 were "public lands," to which the grant immediately attached, thus depriving the United States of power to again reserve them for Indian purposes by treaty.

Propositions of fact

1. The Treaty of 1855 (10 Stat. 1165) was negotiated under circumstances of unseemly haste and pressure with chiefs and warriors not adequately representing the tribe, who were selected by Government agents and rushed to Washington without opportunity to consult their tribal associates, and in ignorance of the purpose of their journey. The small reservations retained were wholly inadequate to the Indian needs, and the treaty was so disastrous as to impose upon the Government a moral obligation to restore some of the lands ceded by it.

2. This moral obligation was impliedly recognized and acted upon by the Treaty of 1863, which restored some millions of the ceded lands and established the Enlarged Leech Lake Reservation.

3. The provisions thus made also proved inadequate and disastrous, the treaty was never wholly performed, and the Government, again recognizing its moral obligations, restored a large additional area by creating the White Earth Reservation.

Propositions of law

1. The stipulations establishing the new reservations contained no exceptions or qualification; they were absolute in their terms, and constituted a solemn treaty engagement that all the lands within their boundaries should thenceforth be Indian lands. The conveyance of the swamp lands to the State was, therefore, a breach of solemn treaty obligations; and that is true whether the stipulation

was beyond the treaty-making power or, being within that power, was violated through a mistake of the officers and agents of the Government.

2. By the later decisions of this court the swamp-land grant of 1850 did not pass an immediate title to lands unsurveyed, not open to settlement, and still in the actual occupancy of Indians.

3. In any event, the Act extending the grant to Minnesota and Oregon contained modifying provisions clearly postponing the vesting of any right or title until after the surveys and the performance of certain conditions.

4. The Act extending the grant contained an express proviso excepting from it any lands thereafter reserved by the United States "in pursuance of any law heretofore enacted;" and a reservation by treaty made pursuant to the Constitution, which is the supreme "law" of the land, falls within the exception.

5. The State, by her silence when the lands were again reserved by treaty, and her continued silence until after they were ceded under the Nelson Act in trust to be sold for the benefit of the Indians, was forever estopped to assert any claim under the swamp-land grant.

6. Even if the State acquired a right or title to the swamp lands by the Act of 1860, that right or title was divested by the treaties of 1863 and 1867. The treaty-making power is vested exclusively in the general Government and has no express limitations. It extends to all things usually

dealt with by treaties among nations, and in exercising it the United States may bind the States in respect to their proprietary rights.

7. The Act of 1860 required the State to select the swamp lands within a time computable from the completion of the surveys, but she did not select them until long thereafter; and, as against the Indians, the Secretary had no authority to waive this requirement.

8. The State forfeited her rights, if any she ever had, by adopting (in 1881) a constitutional amendment directing that the entire proceeds of her swamp lands be placed in the school and other educational funds, there to be preserved inviolate and undiminished, thus wholly diverting the proceeds from the purpose to which they were dedicated by Congress, namely, the drainage of the swamp lands themselves.

Special defenses

The State sets up the defense of the Federal statute of limitations of March 3, 1891, relating to suits to cancel land patents; and also pleads laches in bringing the suit. As to these, we say that:

By express decisions of this court, the statute pleaded does not apply to suits to cancel patents purporting to convey Indian lands;

If laches is ever imputable to the United States, it is inequitable to set up the defense where Indians legally incapable of asserting their own rights are the real parties in interest.

The State further says that the Indians are the only real parties in interest, that many of them are now citizens of the State, and that they are necessary parties plaintiff; further, that the judicial power of the United States does not extend to a suit by individuals against a State.

To this we answer that the Government is here seeking to enforce a trust devolved upon it by treaties and statutes and of a nature which it alone can execute; and it is immaterial that the ultimate beneficiaries of the trust have become citizens of the State.

Position of the State on the merits

The position of the State seems to be that this case involves simply and mainly a question of law arising on the face of the pleadings, namely, whether the swamp land grant gave her an immediate title or vested right. But acts of Congress may be construed broadly or narrowly, as equity and fundamental right and justice require; and the Government contends that the swamp land act must be considered in connection with the treaties, and in the light of all the circumstances prevailing at the time they were made. On the insistence of the Government therefore a stipulation of facts has been made by which the Government undertakes to show, wholly from documentary sources, the facts which we believe should be before the court when it considers the questions of law. (R. 75.) By the stipulation the State ob-

jects to every part of this documentary evidence on the grounds of irrelevance, immateriality, and incompetency; and to some parts she further objects on the ground of hearsay. (R. 414.)

The Government does not understand that by stipulating into the record the most material parts of documents, etc., it is thereby estopped from referring to other historical documents and papers of which the court can take judicial notice.

III

STATEMENT

The treaty of 1855

When the United States first entered into treaty relations with the Chippewa (or Ojibway) Indians they occupied practically all the northern peninsula of Michigan, the northern half of Wisconsin, and the northern half of Minnesota. By 1854 they had ceded all their Michigan and Wisconsin lands except certain small reservations. In September, 1854, at a great convocation of the tribe at La Pointe, Wisconsin, they further ceded a large territory in Minnesota lying west and north of Lake Superior, the western line of the cession being, generally, the East Swan and Vermilion Rivers. (10 Stat. 1109.) By this treaty the interests of two branches of the tribe, designated generally as the Chippewas of Lake Superior and the Chippewas of the Mississippi, were segregated, the latter consenting that all the con-

sideration money for that cession should go to the former, and in consideration thereof the Chippewas of Lake Superior relinquished to the Chippewas of the Mississippi all their interest in the lands theretofore owned by them in common lying west of the western line of the cession. This left the Chippewas of the Mississippi as the owners of the northern and northwestern part of what is now Minnesota, together with a broad strip extending westward into what is now North Dakota.

It is evident that in this treaty the designation "Chippewas of the Mississippi" comprehended all the Chippewas living west of the line of cession, including the Red Lake Indians. But in the treaty of 1855 "Chippewas of the Mississippi" is used in a narrower sense as designating certain bands whose villages were at various places in the southern part of the Chippewa territory.

Up to and including the treaty of 1854 the Government had dealt with the Chippewa tribe as a whole. Thereafter for a number of years it pursued the somewhat Machiavellian policy of dividing them and treating with separate bands, or rather groups of bands, wholly ignoring others which had never consented to a segregation of interests. The wrong and injustice wrought by this policy was, however, finally recognized by the Nelson Act of 1889, which provided that all the Minnesota Chippewas had an equal interest in the

proceeds of the lands thereby ceded for purposes of sale.

In 1855 the Indians with whom we are here concerned were still living in their primitive state. Traders, mainly French, had been among them for several generations, but had not modified their habits or modes of life. On their southern border they had come in contact with white lumbermen, hunters, and settlers, who demoralized them with whisky but did not contribute to their civilization. They procured food "principally by fishing, also by gathering wild rice, hunting deer, and, in some bands, partially by agriculture." (R. 415.) Their villages were of a somewhat permanent character, and were uniformly situated upon the borders of lakes, which were their principal sources of food.

At the time of the treaty of 1855, the principal villages of the Chippewas of Minnesota (excluding the Chippewas of Lake Superior, whose interests had been segregated) were situated as follows (see maps at back of Record):

1. *Chippewas of the Mississippi* (used in the restricted sense).—One village or group of villages on south side of Mille Lac, which is southeast of the present town of Brainerd. Five villages or groups along the Mississippi from Brainerd up stream as follows: at Gull Lake, Rabbit Lake, Sandy Lake, Rice Lake, and Pokagomin Lake.

2. *The Pillager and Winnibigoshish Bands.*—Three groups of villages further up the Mississippi at Leech Lake, Cass

Lake, and Lake Winnibigoshish; and, far to the southwest, one on Otter Tail Lake, which lies at the head of Leaf River northeast of the present town of Fergus Falls.

3. *The Bois Forte Band,* located in the region about Nett Lake, near the Canadian border and west of the Vermillion River.

4. *The Red Lake and Pembina Bands,* located at Red Lake, with some of the *Pembinas* farther west.

This was the situation when, on December 19, 1854, Congress passed an Act (10 Stat. 598) "authorizing the President to enter into negotiations with the Chippewa Indians for the extinguishment of their title "to the lands owned or claimed by them, in the Territory of Minnesota, and State of Wisconsin"; the treaty to provide that *each head of a family* should have in fee simple a reservation of eighty acres to be selected from the ceded lands, etc. (R. 75.) This was at the short session of Congress, and it seems to have been determined in advance that a treaty should be concluded in time to be ratified before the session terminated on March 4th next ensuing.

About two weeks later the Commissioner of Indian Affairs wrote the Governor of Minnesota Territory, who was also Superintendent of Indian Affairs in that region, directing him to "dispatch a messenger with all haste to Agent David B. Herriman, and direct him * * * that he will immediately set out for this city, bringing with him

'Hole-in-the-Day' and six other principal chiefs of the Chippewa Indians of the Mississippi. If possible, I desire him to bring also 'Flat Mouth' and two other chiefs of the Pillagers, and the principal and two other chiefs of the bands near Lake Winnipeg." (R. 76.) Apparently by "Lake Winnipeg" was meant the lake now called Winnibigoshish, as the Indians there located were among those brought to Washington. The letter further directed that "You will specially charge Agent Herriman that if he will not be able to reach Washington by the day limited, viz, February 10th, he will not set out from the Agency, or in case he may have arrived at St. Paul on his way, and it should then appear to be impossible to reach here in time he will in that case not continue his journey, but return."

A runner was accordingly dispatched to Agent Herriman at Crow Wing, who shortly afterwards arrived at St. Paul with Hole-in-the-Day, Flat Mouth, and certain other Indians.

No tribal councils were held to designate representatives, and, in fact, it would seem that the Agent himself selected most of the Indians who were to go. He sent word to the Mille Lac Band, but its chiefs did not arrive at the Agency until the day after he left for St. Paul. They followed on to St. Paul, saw the Governor, charged the Agent with bad faith, that he was taking to represent their band a St. Croix Indian, that he was taking only three chiefs with him and that all the rest were "soldiers," and demanded

to be taken to Washington. The Governor directed the Agent to take the three chiefs with him, but he went without them, and the Governor sent them on later with a letter severely criticizing his conduct. (R. 76, 77.)

Of the two principal chiefs at the making of the treaty, Flat Mouth, of the Pillager and Winnibigoshish (or Winnipeg) Band, was very old, of failing memory, somewhat childish, and very proud of the fact that he had been summoned to the Capital, for he asked for credentials to show the members of his tribe that he had been to Washington. (R. 113.) Hole-in-the-Day, of the Mississippi Band, was young and shrewd; but the three Mille Lac chiefs charged that he had been bribed by traders to betray the tribe before he left for Washington. Two years later he stated to Major Day, then temporarily in charge of the local agency, that at Washington he had been promised $6,000, part of which he would find at St. Paul on his return from Washington, that he did not find it there, that his life had been threatened on his return by the members of his own band because of the treaty; that he had intended to use part of the money to reconcile the dissatisfied; that he had been anxious to have a provision for its payment incorporated in the treaty, but was overruled, and was solemnly assured that it was just as safe as if the provision were in the treaty. Major Day stated that he had

independent reasons for believing that the chief's life was in danger. (See letter of Major Day to the Commissioner reciting these facts. (R. 121.) This letter bears the endorsement "file" and the records of the Interior Department fail to show that it was ever answered.

Neither the Bois Forte nor Red Lake and Pembina Bands was represented. The project evidently was to have the two groups summoned cede all the lands they were willing to claim as their own part of the common property. The Otter Tail Band of Pillagers was not represented, apparently because there was insufficient time to reach them.

At Washington ten interviews were had between the Indians and the Commissioner. Their substance was taken down at the time in long hand, and the original notes are preserved in the Indian Bureau. The record contains them in full (pp. 80–115).

The Commissioner, George W. Manypenny, was suave and tactful, but the whole basis of his argument was the assumption that these primitive savages could be converted into willing and industrious cultivators of the soil in the course of a decade, if relieved of their surplus lands and thrown on their own resources. The Indians had learned by experience that they must sell when the Government wanted their lands, lest from the pressure of white settlement worse evils should befall them. Almost from the first they expressed a

willingness to sell. Their true state of mind, however, was thus expressed by Hole-in-the-Day:

> We are not near so ignorant as white men think us to be. When we view the country once owned by the Indians we feel like a wild beast driven into a hollow tree where he can't get away. (R. 104.)

And again:

> Emigrants are coming among us. They won't be satisfied with the land now open for entry, and we can not resist their encroachments if we would. We should therefore prepare for a state of things which we can not avert and settle down like the whites. (R. 109.)

All they could do was to make the best terms possible. Even in this they were pitifully helpless. Through it all was the constant and repeated statement that Congress was about to adjourn, and if any treaty was to be had it must be ratified before adjournment. It was an implied threat that unless a treaty was agreed to then worse things might befall; and the danger of that was very real. Finally they asked leave to consult a friend in whom they had confidence. This was Henry M. Rice, then delegate in Congress from Minnesota Territory and later a Senator from the State. By his intervention the amounts first offered by the Commissioner were nearly doubled.

The final result was that they ceded some fourteen to sixteen million acres and retained nine

small widely scattered reservations, comprising about 440,000 acres of land and water. Each reservation was situated about a lake and at the sites of their permanent villages, whose locations have already been given, but no reservation was made for the Otter Tail Band of Pillagers which was not represented at the treaty. Nearly half the acreage reserved was water and much of it swamp. In 1889, when the first actual census was taken, there were some 5,210 Indians in the two groups, and they had probably decreased in the meantime. This would probably give them less than fifty acres apiece of dry land.

The money consideration was about $1,000,000, payable mainly in annuities extending over periods of twenty and thirty years. The present worth in cash of that sum would of course be a mere fraction of the total.

Opposite page 458 of the record is a map reproduced from the Eighteenth Annual Report of the Bureau of Ethnology showing the various cessions of Indian lands in Minnesota. The large central area in blue, designated by the large figures 357, shows the lands that were ceded by the Treaty of 1855. The four small tracts in red along the Mississippi designate the reservations for four Mississippi bands, and the three tracts in green on the upper lakes show the reservations for the Pillagers and Winnibigoshish. The reservation for the Mille Lac Band of Mississippi Indians is shown on the next map in red on

the south side of Mille Lac, which name means "Thousand Lakes." The Mille Lac lands had been ceded by the whole Chippewa Tribe in 1837 as part of the tract marked in yellow on the map first mentioned. (Treaty of July 29, 1837, 7 Stat. 536, Art. I.) The Indians probably did not then understand that the north line of that cession would include the Mille Lac villages, for the band remained in undisturbed possession from 1837 to 1855, and for long afterwards. Apparently, however, the lands had been surveyed to the extent of running the township lines, for the treaty of 1855 describes the reservation then established by fractional townships. (Art. I.) The subdivisional surveys were not made until after the provisional cession of this reservation in 1863, namely, in 1870–71, and there was no white settlement upon them until those years. *United States* v. *Mille Lac Chippewas,* 229 U. S. 498, 502.

The Lakes—Swamps—Wild Rice

It will be observed that each of these nine reservations was situated on a lake. This was no accident. For centuries the economic and tribal life of the Chippewa Tribe centered upon the small lakes and connecting watercourses and the swamps of northern Michigan, Wisconsin, and Minnesota. We have already quoted from William W. Warren, historian of the tribe, who wrote in 1852 to the effect that they procured food "principally by fishing, also by gathering wild

rice, hunting deer, and in some bands, partially by agriculture." He named these things in the order of their importance, but he did not name all. These lakes not only swarmed with fish but with ducks, geese, and brant. The swamps were the home of the beaver, otter, and other fur-bearing animals. During the two hundred years preceding 1855 the Chippewas had conquered all this territory from the Sioux, and most often it was the lakes—especially the wild rice lakes—and their surrounding swamps that they fought for. (R. 422, 423; Warren's History, Minn. Historical Collections, v. 5, pp. 156, 306.)

Aside from the fish in the lakes and the fur-bearing animals in the swamps, the fundamental condition which rendered the small lakes and the sluggish rivers the most valuable of all the Indian possessions was the prevalence of *wild rice*. In 1898 there was published, as part of House Document No. 539, 56th Cong., 2d Sess., being the Nineteenth Annual Report of the Bureau of Ethnology, an article by Albert Ernest Jenks on "The Wild Rice Gatherers of the Northwest." We have inserted in the record liberal extracts therefrom. (R. 415–439.) Wild rice is an aquatic plant growing up through the water and carrying its blossoms and seeds on stalks reaching some feet above the surface. It grows best in water from one to four or five feet deep, and requires a muddy bottom with still water or only a sluggish current. In favorable localities the stand is so dense that

a canoe can be pushed through it with difficulty, and it yields from ten to forty bushels per acre. Its seed is dark, somewhat longer than that of white rice, and of a peculiar gamy flavor. At this day it is highly prized as a delicacy by some whites, and is now on sale in small quantities at the best groceries.

Wild rice was the chief vegetable food of the Chippewa Indians for centuries, and is still gathered and used by the Chippewas of Minnesota in preference to other grains. (R. 439.) In 1918 two hundred and thirty Indian families were engaged in harvesting rice from Rice Lake in the White Earth Reservation. (R. 441.) The grain is harvested by the Indians by bending the stalks over their canoes and striking the heads with sticks. It is dried, and was formerly preserved for winter use by burying it in the ground. The Chippewas recognized individual property in wild rice, and it was common to parcel out the rice lakes among the family groups. Often, before the grain was mature, the heads were gathered in bunches, bent over, and tied, so as to preserve the seed from the wild fowl. Probably the greatest density of Indian population in the United States was along Green Bay and Fox River in Wisconsin, where some 20,000 Indians lived in a space 135 miles long and 30 miles wide, and this was attributed by early travelers to the great quantities of wild rice, which served the Indians as food and

attracted vast flocks of wild fowl for their use. (R. 437.)

Writing in 1843, the Indian Agent at La Pointe, Wisconsin, said that 1,000 families of Chippewas collected an average of 25 bushels per family a year. He protested against the payment of annuities to the western Indians at La Pointe at the time of the wild-rice harvest, saying (R. 433):

> If taken away from their rice harvests they lose more than the whole payment amounts to, say about $7 per head.

In 1858 the Agent at Fond du Lac reported that Indians there were "disappointed and sore" because, in running the boundaries of the reservation constituted for them by the treaty of 1854, their rice lakes, which were to have been reserved, were left out, saying (R. 434):

> These lakes * * * abound in fish and wild rice, which constitute the principal subsistence of these Indians * * *. They wished me to say to the Great Father that they are willing to give up *a large portion of the land* in the present reserve if he will attach to the remainder the coveted lakes.

In 1860 the same agent reported that the reservation should have included Perch Lake, which was the only place where they could support themselves the year round, saying that there they obtained an abundance of "field rice and fish," sugar, and game. (R. 434.)

When the wild-rice crop failed, as it did in some places every three to five years (apparently because of high water), the Indians were often reduced to starvation the following winter. See Reports of Indian Agents for the Mississippi and Pillager Bands. (R. 118, 122.)

In 1864 the agent reported that the gardens which the Government farmers were aiding them to cultivate largely failed because of dry weather, but added (R. 147):

> The deficiency is more than made good by the very large rice crop which they have just gathered, and which they will garner for use in midwinter, when other food can not be obtained. Fish, *which have always been the chief reliance of this tribe for subsistence,* have been more than ordinarily abundant.

Treaty of 1863–64

When the Indians learned the provisions of the treaty of 1855 they were so incensed that they threatened the lives of their chiefs. The Pillagers broke into the store of a trader named Bonga, and killed the horse of another trader, giving as a reason that they favored the treaty and had assisted the chiefs on their way to Washington. (Agent's report of October, 1855, R. 119.)

As shown by the letter of Major Day (R. 121), the life of Hole-in-the-Day was in serious jeopardy, and he spent sleepless nights from mortification and chagrin because he had been treated

"like a child" and overreached because he had believed "the white man had but one tongue." However, he made a brave beginning at cultivation (R. 116), but, failing to receive the $6,000 or any part of it, soon ceased his efforts and went bad. In 1862, during the Civil War, occurred the great outbreak of the Sioux, in which nearly a thousand Minnesota settlers were killed. At that time Hole-in-the-Day assembled a force of 300 warriors at Gull Lake and moved to attack the Agency at Crow Wing. The Commissioner of Indian Affairs happened to be at the Agency at the time. He sent for the Mille Lac chiefs, who immediately responded, promised to keep the peace, and joined in the preparations for defense. An outbreak was thus averted until troops arrived. Members of the Gull Lake band, and apparently some of the Pillagers, had, however, committed some depredations against the whites (R. 129); House Executive Document No. 1, 37th Cong., 3d Sess., pp. 170–176 (R. 130, 142). The action of Hole-in-the-Day created intense and indiscriminate hostility among the whites against all the Chippewas. (R. 130, 132, 135–136.) He was later killed by members of his own band.

As regards the good of the Indians the treaty of 1855 was a complete failure. No eighty-acre allotments were ever made under it. Immigrants, lumbermen, and whisky dealers swarmed around the small reservations of the Mississippi bands. The Indians could not be "civilized" out of hand,

and their first efforts at cultivating gardens soon almost ceased. Attempted prosecutions for selling them liquor failed, and the trade was carried on practically without restriction. (R. 127.) There was but one agent for the nine reservations, and they were so widely separated he could do little. (Agents' Reports for 1855 to 1861; R. 115–128.)

The report of September, 1857, says the "great body" of the Indians were retrograding. He gives as the main causes: "1, The use of whisky; 2, *The Treaty of 1855;* 3, The immigration of whites into the country; 4, The errors of missionaries, supported by the government." (R. 123.) From 1857 on, practically all the reports speak of the hopeless condition caused by the small widely separated reservations. That of 1860 says (R. 126–7):

> The separated and scattered reservations would require more than a sleepless Argus to watch and guard them, particularly when the Indians themselves become their own destroyers * * *.
>
> The hunting grounds no longer furnish a livelihood, and the furs which have hitherto been so great a source of revenue are becoming scarce.

Several reports recommend that the Mississippi bands be removed to a large reservation to be created in the Leech Lake region, and that course was finally determined on.

The Secretary of the Interior, J. P. Usher, was in Minnesota in 1862, and there prepared a draft of a treaty to that end, but it was not executed. Later the chiefs of the two groups were again brought to Washington (February, 1863), where a treaty was finally signed on March 11th and promptly ratified by the Senate. (12 Stat. 1249.) The record contains copies of longhand notes of two interviews between the Indians and Commissioner Dole, and of two with the Secretary of the Interior himself. (R. 129–144.) These interviews were only preliminary and the final negotiations took place later between Commissioner Dole and Clark W. Thompson, Indian Superintendent at St. Paul, on the part of the United States, and Henry M. Rice, *Senator from Minnesota,* and the chiefs, for the Indians. No records of these final negotiations have been preserved. The preliminary interviews are, however, very important. Besides the purposes and motives of the government, they show that the Indians were at first almost entirely against the project; that the Indians who knew the Leech Lake country did not believe there was sufficient rice, game, and tillable soil there to support the additional Indian population; and that the Secretary of the Interior himself assured them that they ***could still hunt and fish and gather wild rice over the ceded territory to the north and west.*** By what representations the consent of the Indians was finally obtained we do not know, but presumably the main induce-

ment was the great area set apart for them out of the lands ceded in 1855.

By Article I the Indians ceded the six reservations of the Mississippi bands known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake. Article II reads in part as follows:

> In consideration of the foregoing cession, the United States agree to set apart for the future homes of the Chippewas of the Mississippi *all the lands embraced within the following described boundaries,* excepting the reservations made and described in the third clause of the second article of the said treaty of February 22d, 1855, for the Pillager and Lake Winnibigoshish bands.

A new treaty was made the following year, namely, May 7, 1864 (13 Stat. 693), which practically superseded the treaty of 1863. It contained substantially the same provisions, but added a long, narrow strip of territory extending far to the northwest and there terminating on Red Lake River. It repeated in identical terms the language above quoted. This new reservation is shown in light pink on the second map at the back of the record, bearing the large figures 507. The three irregular tracts in darker pink are the reservations established by the treaty of 1855 for the Pillager and Winnibigoshish Bands. The green central area was all part of the new reservation and shows the final Leech Lake Reservation as cut down by

the next treaty (1867). The other provisions of the treaty of 1863–4 are not material here.

This treaty was signed by Senator Henry M. Rice, as one of the negotiators for the Indians. The preliminary interviews show that the Minnesota delegation in Congress knew what was going on, but it is abundantly clear that it never occurred to them, or to the Secretary, the Commissioner, or anyone else, that Minnesota could claim the swamp lands, or that the treaty-making power could not set apart for the Indians "all the lands embraced" in the boundaries described.

The treaty of 1867

The Indians had correctly described the Leech Lake country in their interviews with Secretary Usher. Little of the ground about the lakes was fit for cultivation. The ground in general was cold and barren, and the Pillagers and Winnibigoshish were already in possession of the few and scattered tillable spots. The Mississippi bands, like all Indians, were reluctant to remove to it. An old trader among them wrote (R. 150):

> I have always noticed that it is ten, I might say twenty, times more difficult to remove Indians than it is to make treaties with them.

Apparently only the Rabbit Lake and Sandy Lake bands were actually removed to the new reservation, and this did not occur for some years. They were placed at White Oak Point by a re-

moval which the agent characterized as a fraud on the Government, and were soon in a deplorable condition. (R. 153, 155.) The Otter Tail band remained in their old position on lands ceded in 1855, surrounded by whites, and were a continual source of trouble. (R. 153.)

The treaties of 1863 and 1864 were in fact merely tentative. The bands as a whole were dissatisfied and unsettled, because they did not know what was to be done with them. (R. 148.)

On the Government's part new projects were almost immediately under consideration, one apparently being a wholesale removal to the Red Lake country. (R. 147, 148.) In the winter of 1867 the chiefs were again brought to Washington, and a new treaty was concluded March 19th. (16 Stat. 719.) No record of the negotiations was preserved, but the treaty itself shows the main inducement. It contains the following preamble:

> Whereas, by a certain treaty ratified March 20th, 1865, between the parties aforesaid, a certain tract of land was, by the second article thereof, reserved and set apart for a home for the said bands of Indians, and by other articles thereof provisions were made for certain moneys to be expended for agricultural improvements for the benefit of said bands; and whereas it has been found that the said reservation is not adapted for agricultural purposes for the use of such of the Indians as desire to devote themselves

> to such pursuits, while a portion of the bands desire to remain and occupy a part of the aforementioned reservation and to sell the remainder thereof to the United States: Now, therefore, it is agreed, etc.

By the first Article, the Indians ceded some 2,000,000 acres from the newly created Leech Lake Reservation, reducing it to the area shown in green on the map. Doc. 63 (Minnesota 2). A new reservation was created as follows (Art. II):

> In order to provide a suitable farming region for the said bands there is hereby set apart for their use a tract of land, to be located in a square form as nearly as possible, with lines corresponding to the government surveys; which reservation shall include White Earth Lake and Rice Lake, and contain thirty-six townships of land: and such portions of the tract herein provided for as shall be found upon actual survey to lie outside of the reservation set apart for the Chippewas of the Mississippi by the second article of the treaty of March 20th, 1865, shall be received by them in part consideration for the cession of lands made by this agreement.

There was no exception of swamp or any other land, and the article was unquestionably an unqualified stipulation that *all the lands in the thirty-six townships* should be Indian lands. It was not a mere gift, but the article itself recites that it is to be "received by them in part consideration for the cession of lands made by this agreement."

That the lands were wholly unsurveyed is shown by Articles VI and VII, which provide that the new reservation shall be located "as near as may be" and shall later be surveyed for purposes of individual occupation and ultimate allotment. The provision that the reservation should include White Earth and Rice Lakes was of the utmost importance; and one of the main considerations with the Indians. Rice Lake is one of the greatest producers of wild rice in the whole country. It is about four miles long and contains about 1,650 acres. All but 100 acres was densely covered with wild rice in 1918, and in that year 230 families were encamped about it and engaged in the harvest. The examining agent estimated that its average production, if all were gathered, would be at least 15,500 bushels, worth at going prices $170,000 to $200,000. The lake is wholly surrounded by swamp lands, most of which have been patented to the State, and a large part already sold by the State to white men, *who are claiming ownership of the bed under the local law of Minnesota.* (R. 439.) This lake is within a drainage project, and in 1922, notwithstanding an injunction suit, the lake was drained and the entire rice crop destroyed just before harvest time. It has since been partially dammed and rice is again growing. (R. 439–449.)

After the creation of the White Earth Reservation the activity in treaty-making ceased for some years. The Indians, however, removed slowly and

reluctantly to White Earth, and no effort was made to remove them forcibly. They roamed freely about the country, becoming more and more demoralized. The same was true of the Otter Tail Band. The picture of their condition, as well as that of the Pillagers and Winnibigoshish, during the ensuing years is a doleful one. See reports of Agents. (R. 151–160.) At Leech Lake the rice was growing less and less, and, to cap the climax, the Government, without the consent of the Indians, caused reservoir dams to be constructed at the outlets of Leech and Winnibigoshish Lakes and flooded 46,920 acres of their land and destroyed their gardens, their rice fields, their hay land, their fish, and their graveyards. (R. 185.) This was done under Acts of Congress which provided for a determination of damages by the Secretary of the Interior. (21 Stat. 481; 22 Stat. 204.) The damage was finally fixed at $150,000, but nothing was paid the Indians for many years, and this act of bad faith was long a sore spot with them. On August 19, 1890, Congress finally appropriated the money. (26 Stat. 336, 357.)

The proceedings of the Northwest Commission

By the Indian Appropriation Act of May 15, 1886 (24 Stat. 29, 44), Congress authorized the Secretary to negotiate treaties with the Chippewa and other Indian tribes in the Northwest. A commission was appoined by the Secretary, consisting of Hon. John V. Wright, of Tennessee;

Bishop H. B. Whipple, of Minnesota; and Charles F. Larrabee.

This body became known as the Northwest Commission. Bishop Whipple, of the Methodist Episcopal Church, was a lifelong friend of the Indians, and was especially familiar with the Chippewas and their affairs. The Act authorized negotiations with the Chippewas—

> for such modification of existing treaties * * * and such change of their reservation as may be deemed desirable by said Indians and the Secretary of the Interior, and as to what sum shall be a just and equitable liquidation of all claims which any of said tribes now have upon the Government.

This Commission visited all the Chippewa reservations in Minnesota and held open sessions with all the Indians of the various bands who could be induced to attend. In general, and with some exceptions inferable from statements appearing, all that was said was reported stenographically and is printed as part of their report. (Senate Doc. No. 115, 49th Cong., 2d Sess.)

Two agreements were concluded, one with the Mississippi Pillager and Winnibigoshish Bands and one with the Red Lake Band. The former provided for the removal of all the Indians affected by it to the White Earth Reservation, and it is usually styled the White Earth Agreement. The Leech Lake Reservation, as reduced by the

treaty of 1867, and all other lands outside the White Earth, were to be ceded. The ceded lands of the Mississippi bands, *without any distinction as to class or character*, were all to be appraised and sold at auction for the benefit of the Indians. (Art. IX.) The ceded lands of the Pillagers and Winnibigoshish were to be classified as "timbered and untimbered," and all appraised and sold at auction for their benefit.

The Red Lake Agreement provided for the cession of about 2,000,000 acres in trust, to be classified as "timbered and untimbered" land and appraised and sold at auction, etc. (Art. II, p. 22.)

Both agreements provided for a tribal fee title to the surplus reserved lands after the making of all allotments.

An adverse report was made on these agreements by Representative, afterwards Senator, Nelson, of Minnesota, as Chairman of the Committee on Indian Affairs, and they were never ratified by Congress. (House Report No. 789, 50th Cong., 1st Sess.) The Committee objected to the sale of the lands at auction as likely to place large tracts in the hands of speculators, but had no word to say about the swamp lands or the provisions for their sale as "untimbered" or of any possible right or claim to them by the State.

One part of the report discloses the attitude of mind with which the House Committee considered the property rights of Indians as follows:

> The Red Lake agreement is also open to serious objection in perpetuating forever the tribal evolution of those 1,100 Red Lake Indians, by *giving them* in perpetuity a tribal fee title to a cool million acres of agricultural lands, less the individual allotments, which could not well exceed 160,000 acres of land. This seems *the height of prodigality,* to first *give* each of these Indians a farm and then *give* the whole band—only 1,100 of them—over 800,000 acres in common in fee forever.

While this court recognizes the doctrine of an underlying fee, or exclusive right of preemption, in the United States, certainly it has never sanctioned the idea that when reservations are made of portions of territory occupied by Indians from time immemorial, the United States is *giving* them anything.

The stenographic report of the negotiations of the Northwest Commission throws a flood of light upon the transactions of the government with these Indians. It shows especially their faith and dependence upon the verbal representations and promises made them in the course of the negotiations, and their surprise and disappointment when the actual provisions of the written instrument are brought home to them in the course of administration and interpretation.

As one of the inducements to removal to White Earth, the Commission repeatedly emphasized to

each band the quantities of wild rice there available.

The Commission, in its report, comments upon the evils of making treaties at Washington as follows (p. 13):

> In past years the treaties with these and other Chippewa Indians have been made with a few of the chiefs and headmen only; *in one instance but two being present;* and, with the single exception of the Red Lake and Pembina Treaty of 1863–'64, every treaty since 1854 has been made in Washington. Such has been the custom, and it has been a most fruitful source of discord and dissatisfaction on the part of the great body of the Indians.

The Nelson Act of January 14, 1889 (25 Stat. 642)

On recommending the rejection of the agreements negotiated by the Northwest Commission, the House Committee announced that it had prepared a bill in place thereof making propositions to the Chippewa Indians to become effective upon their acceptance. This bill was passed in 1889, became known as the Nelson Act, and was accepted by the Indians in 1890. This legislation has been before this court in various aspects. *Minnesota* v. *Hitchcock,* 185 U. S. 373; *United States* v. *Mille Lac Chippewas,* 229 U. S. 498; *United States* v. *Holt State Bank*—the *Mud Lake* case—argued last term and not yet decided.

Pursuant to this Act the Indians ceded all the enlarged Leech Lake Reservation together with the three small Pillager and Winnibigoshish reservations inclosed within its boundaries; all the Mille Lac Reservation; four townships off the east side of the White Earth; about 2,200,000 acres from the Red Lake; and the small reservations in the northeastern part of the State at Bois Forte, Grand Portage, and Fond du Lac. Individuals of each band, however, had the right to take allotments from the ceded lands of their own reservation, if they chose, rather than remove to White Earth.

The Act repaired, so far as could be done, the wrongs done by previous treaties in taking from separate bands cessions of large parts of the common property of the whole tribe. To that end all the lands ceded, wherever situate, were to be sold for the common benefit of all.

The provisions of special importance here are contained in Section 4. It declares that "the lands so ceded" shall be surveyed and thereafter personally examined by examiners.

> who shall go upon said lands thus surveyed and personally make a careful, complete, and thorough examination of the same by forty-acre lots, for the purpose of ascertaining on which lots or tracts there is standing or growing pine timber, which tracts on which pine timber is standing or growing for the purposes of this Act shall be termed "pine lands," etc.

The Section then directed that the "pine lands" be appraised and sold at public auction, etc. Then follows this:

> All other lands acquired from the said Indians on said reservations other than pine lands are for the purposes of this Act termed "agricultural lands."

Section 6 provides that "when any of the agricultural lands on said reservation" have been surveyed, they shall, on thirty days' published notice "be disposed of by the United States to actual settlers only under the provisions of the homestead law."

The sole exception was in the second proviso to Section 6, reading:

> That nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting, valid, preemption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon.

The Act contained nothing about school lands or swamp lands, or any possible claims of Minnesota to any of the lands thereby ceded. The prolonged negotiations by which the assent of the Indians was procured were taken down stenographically and accompanied the report of the Commission, and are reproduced in full in the record (pp. 194–

414). As in all previous negotiations there was no hint of any possible claim of the State to any of the ceded lands. Beyond all question the negotiations were conducted and the cessions made on the absolute assumption that all the ceded lands were to be sold for the benefit of the Indians. But the matter does not lie in inference from silence merely. In their report the Commissioners say (R. 191):

> On some of the reservations there are *swamps* of valuable cedar and tamarac which cannot be cultivated or sold for agricultural purposes, and the land is liable to be denuded of the timber by trespassers. The Indians request that such land be withheld from sale under the preemption laws [meaning the homestead laws], and that the Secretary of the Interior be authorized to cause the same to be sold in such manner and upon such terms as to him shall seem best for their interest.

The Secretary of the Interior, in his report to the President, *concurs in this recommendation,* and recommends legislation to carry it into effect. (R. 168.) That there were large quantities of valuable timber growing on the swamp lands is further shown by the fact that in the bill of complaint the Government alleges that the State has cut and is cutting and disposing of large quantities of timber from the lands erroneously patented to her and asks for an injunction and for a disclosure as to the quantities, etc., thus taken (R.

7, sub. 14); and the State, without denying the allegations, promises to make the disclosures asked (R. 66, Par. VI).

It is clear beyond question, therefore, that everybody connected with the transactions then understood that all the lands within the boundaries of the ceded areas were to be disposed of for the benefit of the Indians except those embraced in then existing and valid preemption and homestead entries. The Act itself is susceptible of no other construction. If it be supposed that the choice of the language "*all other lands acquired from the said Indians on said reservations* other than pine lands" was intended as anything else than a mere substitute for "all the lands ceded," yet on analysis the two expressions mean exactly the same thing. Possibly the use of the phrase was suggested by the fact that on the Mille Lac Reservation there were lands settled and entered by whites, on the theory that they were open to settlement after the qualified cession of 1863; and in 1889 there was a pending dispute about them. *United States* v. *Mille Lac Chippewas, supra.*

From the foregoing narrative it is abundantly demonstrated that the United States, by the treaties of 1863-4 and 1867, stipulated in absolute and unqualified terms that all the lands within the boundaries of the enlarged Leech Lake and the White Earth reservations were set aside for the Indians; and that in the agreement under the Nelson Act it

again solemnly stipulated that all the land then ceded from those and other reservations should be disposed of for the benefit of the Indians, with the single exception above stated. When, therefore, the officials of the Government patented the swamp lands to the State, it was in direct violation of solemn treaty engagements, a breach of faith which at this late day the United States in this suit seeks to repair and make good. It was a breach of faith, whether the United States promised what it had power to perform and did not, or whether through ignorance of the law or thoughtless indifference it made promises it could not perform, because the swamp lands had already passed beyond its control.

Unfortunately, this was not the first serious breach of faith of which the Indians had reason to complain. Especially there were three others of older date, which caused much embarrassment both to the Northwest Commission and the Commission which obtained the cessions under the Nelson Act, and in the latter negotiations led to one of the most dramatic and humiliating incidents ever experienced by the negotiators of a great nation.

In 1847 (9 Stat. 908) the Chippewas ceded to the United States some 700,000 acres on their southwestern border for the occupancy of the Menominee Tribe of Wisconsin, who were to be removed to it. The real consideration with the Chippewas was the interposition of this tribe between them and the Sioux, with a view to stopping the fierce war which for generations had raged between the two tribes;

and accordingly they received in addition a mere nominal consideration in goods. In the treaty itself, however, this purpose was expressed only in the following equivocal language (Art. III):

> It is stipulated that the country hereby ceded shall be held by the United States as Indian land until otherwise ordered by the President.

To carry out the plan, the Government, by treaty of 1848 (9 Stat. 952), procured a cession of the Menominee lands in Wisconsin in exchange for this Minnesota tract. Later the Menominees declined to remove, and by a treaty of 1854 (10 Stat. 1064) ceded the Minnesota lands to the Government in exchange for a new home in Wisconsin. The Government then opened the Minnesota lands to settlement. The real consideration was thus denied to the Chippewas, and the Government never recognized any further obligation to them. (R. 181–182.)

A second breach was when the Government, without consulting the Indians, erected dams at Leech, Cass, and Winnibigoshish Lakes, flooded 46,920 acres of their reservation lands, destroyed their gardens, their rice fields, their hay lands, their fish, and their graveyards, and failed for years to offer them compensation except in trifling sums which they rejected. (R. 182–186.)

The third instance was that numerous installments of annuities under older treaties were never paid, and in 1880 the books were examined and the

amount in arrears was found to be $118,400; yet payment thereof had never been made up to the time of the negotiations of 1890. (R. 178–180.)

In these negotiations these things were all brought up by the Indians. At Leech Lake, particularly, there were stormy sessions, and the Commissioners, honest and sincere men as they were, could not and did not attempt to deny these breaches of faith. The Indians finally demanded that the Commissioners raise their hands and solemnly promise that they would do their utmost to have an immediate settlement of these old scores; and that the Commissioners did in order to induce the savages to rely upon the new promises contained in the Nelson Act, among which was the promise that *all the lands* thereby to be ceded *should be sold for their benefit.*

The Secretary's decisions awarding the swamp lands to the State

The first decision was upon a claim by the State for the swamp lands in the ceded portion of the Red Lake Reservation. Her claim was denied on the ground that these lands had never been ceded before the Nelson Act and there was no time when the swamp land grant could have attached to them. (22 L. D. 388.) Accordingly, no patents have ever been issued for swamp lands there.

The decisions awarding to the State the swamp lands ceded from the other reservations are reported in 27 L. D. 418; 32 L. D. 328, and 37 L. D. 397.

These decisions deal with the questions involved in a purely technical way, and, it is hardly too much to say, decide them according to the principles properly applicable in cases of conflicting grants by the government of lands unquestionably its own. They necessarily refer to the treaties of 1863–4 and 1867, but contain no comments on the unqualified stipulations therein contained, and betray no consciousness that the patenting of the swamp lands to the State involved a breach of treaty obligations. While the idea is not expressed, it would seem that the decisions must have been made upon the assumption that the Indians knew, or were chargeable with knowledge, that the swamp lands had passed to the State at the time the new and enlarged reservations were created, and therefore formed no part of the consideration upon which they executed the two treaties and gave up other lands indubitably theirs.

The first decision (27 L. D. 418) discusses only two questions: First, whether the swamp-land grant of 1850, as extended to Minnesota by the Act of 1860, was a grant *in praesenti,* and this was decided in the affirmative; second, whether the treaties of 1863–4 and 1867 were made *pursuant to* the Act of 1854 authorizing the President to negotiate for the cession of all the Chippewa lands in Minnesota, so as to cause the lands thereby again reserved to fall within the exception of "lands * * * sold or disposed of (in pursuance of any

law heretofore enacted)." This was decided in the negative, and that ended the matter.

The second decision (32 L. D. 328) related to swamp lands of the "Mississippi Chippewas" reservation, meaning apparently that part of the enlarged Leech Lake Reservation assigned to the Mississippi band by the treaty of 1863–4. This decision merely followed perfunctorily that in 27 L. D. 418.

The third decision (37 L. D. 397) followed the prior ones, but discussed some additional questions, which will be dealt with later. It also referred to an opinion of the Attorney General, dated June 15, 1906, sustaining the position previously taken by the Interior Department. (25 Opin. 626.) That opinion also deals with the matter simply as one involving the construction of the swamp-land grant, and discloses no consciousness that it was sanctioning the breach of treaty stipulations. It dismisses the Indians with the remark that their rights "seem now to have been reduced by the Act of January 14, 1889, to a right to receive in money proceeds of the lands," and adds:

> I do not think any such supposed rights of the Indians to money should now stand in the way of the fulfillment of the Government's grant of the lands to the State. Equivalent money could be paid to the Indians if any is due for swamp lands in the former reservation.

It remains to be added that under these decisions a large portion of the swamp lands lying within that part of the White Earth Reservation not ceded under the Nelson Act (only four townships were ceded) have also been patented to the State. And if the grounds given for those decisions are valid, it follows necessarily that these lands were properly patented. That reservation, as so reduced, exists to-day as the final home of all the Chippewas (except those of Red Lake) who could be induced to remove to it and take their allotments there.

Decisions of the Court

The District Court for Minnesota, however, has totally disagreed with the Secretary's decisions. In some instances lands allotted to Indians were also patented to the State, or selected by the State, as swamp. Two controversies thus arising have been decided by that court, and in one case it held that the patent to the State was void, and in the other that a State swamp selection was void and constituted no obstacle to an allotment of the same lands to an Indian. No opinions were given, but we have reproduced in the record the decrees and sufficient of the pleadings, findings, etc., to show the decisions made. (R. 450–457.)

The patenting of the lands

Under the decisions above discussed, six patents were issued purporting to convey swamp lands lo-

cated in the ceded Leech Lake Reservation, and in the White Earth Reservation and the four townships ceded from it. The first patent was dated May 17, 1900, and the last June 10, 1912. Together they embraced 152,124.18 acres. In the meantime, a series of controversies had arisen between the land department and the State over the administration of the swamp-land grant, and on November 19, 1913, the issuance of swamp-land patents was suspended. On July 14, 1915, the Secretary of the Interior made a written demand on the Governor for the reconveyance of several hundred thousand acres which he claimed had been erroneously patented, but no conveyance was ever made. From that time until 1922 negotiations were carried on between the land department and the State officials with a view to an amicable adjustment, but these efforts failed. (R. 10, 66.)

The State is claiming additional swamp lands not yet patented. The locations of the lands patented and claimed are shown on the two maps at the back of the record, the patented lands appearing in pink and the additional lands claimed in green.

On the White Earth map we call especial attention to the lands lying around Wild Rice Lake. All except one small fragment on the west side are swamp. Most have already been patented, and many tracts have already been sold by the State to private parties. This is the lake which in 1918 produced from $150,000 to $200,000 worth of wild

rice, and which, on account of its wild rice, was especially named in the treaty of 1867 creating the reservation. The white purchasers are now claiming the bed of this lake under the local law of Minnecota, and if this court, in the *Mud Lake case* (*United States* v. *Holt State Bank*), argued last term, shall decide that the State law governs the rights of riparian owners, the Chippewa Indians will lose this lake which produces the best *agricultural* crop raised on the reservation. That result will follow, whichever party prevails in the present litigation, because, as to those swamp lands which the State has sold we felt compelled to pray only for their value from the State, as we believed we could not join as defendants, without ousting the original jurisdiction of this court, those citizens of Minnesota who hold deeds from her to Indian swamp lands. *California* v. *Southern Pacific Co.*, 157 U. S. 229.

The State's lack of equities

As against the overpowering equities of the Indians, how stands the case with the State?

She was a mere donee of the swamp lands, taking a munificent gift without any consideration whatever. But a duty was imposed upon her in connection with the gift. The swamp lands were granted for the express purpose of enabling the States "to construct the necessary levees and drains to reclaim the swamp lands therein," and it was further provided (Act September 28, 1850, 9 Stat. 519):

> That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

The fundamental purpose was, of course, that the swamp lands should pay for their own drainage so as to pass to home makers and cultivators at low prices.

Of the Chippewa swamp lands patented to her, however, the State has devoted neither any lands in kind nor any proceeds to drainage purposes. Nineteen years before the date of the first patent the State had amended her constitution so as to divert her whole swamp-land grant from the purpose expressed in the granting Act. This amendment was adopted November 8, 1881 (Laws Minn. 1883, p. 3), and the pertinent part reads as follows:

> All swamp lands now held by the State, or that hereafter may accrue to the State, shall be appraised and sold in the same manner and by the same officers, and the minimum price shall be the same, less one-third, as is provided by law for the appraisement and sale of the school lands under the provisions of title one of chapter thirty-eight of the General Statutes. The principal of all funds derived from sales of swamp lands as aforesaid shall forever be preserved inviolate and undiminished. One-half of the proceeds of said principal shall be appropriated to the common schools fund of the

> State; the remaining one-half shall be appropriated to the educational and charitable institutions of the State in the relative ratio of cost to support of said institutions.

A further amendment was made in 1916 (Laws Minn. 1916–17, p. 1), as follows:

> A revolving fund of not over two hundred fifty thousand dollars ($250,000) may be set apart from the fund derived from the sale of school and swamp lands, to be used in constructing roads, ditches, and firebreaks in, through, and around unsold school and swamp lands and in clearing such lands, such fund to be replenished as long as needed from the *enhanced value realized from the sale of such lands so benefited.*

The State, however, alleges that she has appropriated over $2,000,000 of general revenues and that her local subdivisions have spent vast sums in addition for drainage of the swamp lands, and implies without directly stating that this was in substance a compliance with the purpose expressed in the grant. (R. 66.) This is wholly illusory.

Less than one year after the issuance of the first of these patents, the State Legislature passed a general drainage law. (Laws 1901, c. 258, p. 418.) The costs were to be paid by assessment of benefits (§ 6 and § 22):

> All lands owned by this State * * * shall be liable for such benefits the same as owners of taxable lands.

By § 23 money was appropriated for the first and ensuing years to pay assessments on the State lands.

These provisions have been in force ever since.

On April 13, 1905, an Act was passed for the appraisal and sale of the "school or other State lands" and it was provided (Laws Minn. 1905, c. 162, p. 196) that:

> No school or other state lands shall be sold until so appraised, nor for a less price than five dollars ($5.00) per acre.
>
> * * * * *
>
> After the State has constructed or has been assessed for any public ditch or drain, the lands hereby assessed or improved shall thereafter be reappraised before being offered for sale.

The reappraisement, of course, added to the minimum price, or the previous appraisal, at least the amount of benefits assessed. So that the moneys appropriated by the Legislature for drainage always came back and went into the educational and charitable fund, often, no doubt, with a welcome increase.

ARGUMENT

I

The propositions of fact

By the foregoing historical recital and references to parts of the records we have already demonstrated our three propositions of fact, namely:

1. The treaty of 1855 was negotiated under circumstances of haste and pressure, with chiefs not

adequately representing their bands; the small scattered reservations constituted by it were inadequate to the Indian needs; and the whole arrangement was so disastrous to them as to impose upon the Government a moral obligation to restore some of the lands then ceded.

2. This moral obligation was recognized and acted upon by the Government in the treaty of 1863–4 by creating the enlarged Leech Lake Reservation.

3. The lands thus restored were unfit for agriculture, insufficient and inadequate in other respects, and this was expressly acknowledged by the United States in the treaty of 1867 establishing the White Earth Reservation on lands ceded in 1855.

II

First proposition of law

We have in the same way already demonstrated our first proposition of law, namely:

That the treaties constituting the new and enlarged reservations out of lands ceded in 1855, were without exceptions or qualifications and constituted solemn engagements that *all* the lands included in those reservations should be Indian lands; and that the Nelson Act contained an equally solemn engagement that *all* the lands (save only those embraced in pending *entries*) should be sold for the benefit of the Indians, either as "pine lands" or "agricultural lands."

III

The special defenses

We meet next the defenses of the statute of limitations and laches; that the Indians are "essential parties," and that "the judicial power of the United States does not extend to suits brought by or on behalf of individuals against a State."

1. *Limitations.*—The statute especially pleaded is the Act of March 3, 1891. (26 Stat. 1096, 1099, c. 561, § 8.) The only other statute is that of March 2, 1896. (29 Stat. 42, c. 39, § 1.) As to both, this court has expressly decided that they apply only to public lands subject to disposition under the land laws and not to Indian lands. *Northern Pacific Ry. Co.* v. *United States,* 227 U. S. 355, 367; *La Roque* v. *United States,* 239 U. S. 62, 68.

2. *Laches.*—"The defenses of stale claim and laches can not be set up against the Government." *United States* v. *Dalles Military Road Co.,* 140 U. S. 599, 632, citing *United States* v. *Kirkpatrick,* 9 Wheat. 720; *United States* v. *Van Zandt,* 11 Wheat. 184; *United States* v. *Nicholl,* 12 Wheat. 505; *Dox* v. *Postmaster General,* 1 Pet. 318; *Lindsey* v. *Miller,* 6 Pet. 666; *Gibson* v. *Chouteau,* 13 Wall. 92; *Gaussen* v. *United States,* 97 U. S. 584; *Steele* v. *United States,* 113 U. S. 128; *United States* v. *Insley,* 130 U. S. 263.

And if laches were ever imputable to the United States it certainly can not be recognized as a defense where the suit is to assert the rights of a

people dependent upon it for protection and actually incapable of asserting their own rights against the State, even though they may be citizens thereof.

3. *Parties.*—The mere granting of citizenship does not dissolve the tribal relation and leave the Indians to assert their own rights in the courts. The United States may, and still does continually, bring suits in its own name, without joining them as plaintiffs, to enforce the trusts which devolve upon it under treaties and Acts of Congress. *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 307–8; *United States* v. *Rickert,* 188 U. S. 432; *United States* v. *Celestine,* 215 U. S. 278; *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 311; *United States* v. *Sandoval,* 231 U. S. 28; *United States* v. *Nice,* 241 U. S. 591, 598.

It is true that in *United States* v. *Waller,* 243 U. S. 452, this court held that a Chippewa Indian who, under the Clapp Amendment (34 Stat. 1015, 1034), had been invested with the full fee title to his allotment free from all restriction on alienation must assert his own rights to that property as against another individual, and the United States had no capacity to sue for him. But here the United States is suing to remove a cloud on the title to lands still held in trust by the Government under the Nelson Act, for purposes of sale, which trust it alone can execute. Neither a single Chippewa Indian citizen nor all of them together could maintain such a suit, or execute the trust even if they could recover the land. Manifestly the

United States alone can do both, and the duty to carry out the trust still exists, notwithstanding the grant of citizenship.

4. *Jurisdiction.*—For substantially the same reasons the jurisdictional objection is without merit. While the suit, if successful, will ultimately redound to the benefit of individual Indians by the disposal of the lands by the United States, the placing of the proceeds to the credit of the Indians and their final distribution, yet no individual can be said to have a separate interest in the fund while the lands are still unsold and the legal title thereof is held by the United States in trust for purposes of sale. In other words, the United States has full power to do all things necessary to enable it to execute the trust and perform the duties it assumed under the Nelson Act and the cessions made pursuant thereto.

IV

The swamp-land grant of 1850 did not pass an immediate, indefeasible title to lands unsurveyed, not open to settlement, and still in the actual occupancy of Indians

A. The swamp-land legislation

The original swanp-land grant of September 28, 1850 (9 Stat. 519), reads as follows:

> That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the

passage of this act, shall be, and the same are hereby, granted to said State.

SEC. 2. *And be it further enacted,* That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however,* That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

SEC. 3. *And be it further enacted,* That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

SEC. 4. *And be it further enacted,* That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as designated as aforesaid, may be situated.

For many years after the grant of 1850 there was great delay on the part of the Secretary of the Interior in identifying the swamp lands, due mainly to lack of surveys, want of sufficient force, etc. Many of the States became impatient and undertook, themselves, to identify and sell the swamp lands. Great confusion resulted, because the States sold lands as swamp which were entered, under the preemption and other land laws, as dry lands, and *vice versa*. See statement of these conditions in *Tubbs* v. *Wilhoit,* 138 U. S. 134, 137–8.

The conflict of claims thus arising led to a number of relief Acts, among which the two following are very significant as legislative constructions of the original grant.

Act of March 2, 1855 (10 Stat. 634):

> That the President of the United States cause patents to be issued, as soon as practicable, to the purchaser or purchasers, locator or locators, who have made entries of the public lands, claimed as swamp lands, either with cash, or with land warrants, or with scrip, prior to the issue of patents to the State or States, as provided for by the second section of the act approved September twenty-eight, eighteen hundred and fifty, entitled "An Act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," any decision of the Secretary of the Interior, or other officer of the government of the United States, to the contrary notwithstanding: *Provided,* That in all cases where any State,

through its constituted authorities, may have sold or disposed of any tract or tracts of said land to any individual or individuals prior to the entry, sale, or location of the same, under the preemption or other laws of the United States, no patent shall be issued by the President for such tract or tracts of land, until such State, through its constituted authorities, shall release its claim thereto, in such form as shall be prescribed by the Secretary of the Interior: *And provided,* further, That if such State shall not, within ninety days from the passage of this act, through its constituted authorities, return to the General Land Office of the United States, a list of all the lands sold as aforesaid, together with the dates of such sale, and the names of the purchasers, the patents shall be issued immediately thereafter, as directed in the foregoing section.

SEC. 2. *And be it further enacted,* That upon due proof, by the authorized agent of the State or States, before the Commissioner of the General Land Office, that any of the lands purchased were swamp lands, within the true intent and meaning of the act aforesaid ,the purchase money shall be paid over to the said State or States; and where the lands have been located by warrant or scrip, the said State or States shall be authorized to locate a quantity of like amount, upon any of the public lands subject to entry, at one dollar and a quarter per acre, or less, and patents shall issue therefor, upon the terms and conditions enumerated in the act aforesaid:

Provided, however, That the said decisions of the Commissioner of the General Land Office shall be approved by the Secretary of the Interior.

It is perfectly apparent that Congress did not then understand that the original grant conveyed an immediate and indefeasible title to specific tracts of swamp land. Otherwise it would not have directed the issuance of patents to entrymen under other land laws of lands "claimed as swamp."

The second Act was passed March 3, 1857 (11 Stat. 251), and reads as follows:

> That the selection of swamp and overflowed lands granted to the several States by the act of Congress, approved September twenty-eight, eighteen hundred and fifty, entitled "An Act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," and the act of the second of March, eighteen hundred and forty-nine, entitled "An act to aid the State of Louisiana in draining the swamp lands therein," heretofore made and reported to the Commissioner of the General Land Office, *so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States,* be and the same are hereby confirmed, and shall be approved and patented to the said several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable after the passage of this law: *Provided, however,*

> That nothing in this act contained shall interfere with the provisions of the act of Congress entitled "An Act for the relief of purchasers and locators of swamp and overflowed lands," approved March the second, eighteen hundred and fifty-five, which shall be and is hereby continued in force, and extended to all entries and locations of lands claimed as swamp lands made since its passage.

It is manifest that if the grant conveyed an absolute present title, Congress had no right to except from the confirmation swamp lands "interfered with by an actual settlement under any existing law," etc.

B. Decisions under the swamp land act

The decisions of the Supreme Court under the swamp land grant are numerous and some are hard to reconcile with others. The inconsistencies in the concrete decisions are more apparent than real, and, such as they are, arose from the struggle of the court to do justice as between *private* claimants asserting rights as purchasers of swamp lands from the States and other private claimants asserting rights or title under the preemption, homestead, or other general land laws, or under conflicting grants in aid of railroads or other public improvements.

The difficulties confronting the courts in thus doing justice between private claimants arose mainly from the fact above stated that while the States

were disposing of lands as swamp the United States was disposing of the same tracts as non-swamp under the general land laws or under other grants, without any actual examination or knowledge of their true character.

So far as concerns the *general expressions* used in the opinions, all the cases agree that the swamp land grant was a grant *in praesenti;* and the earlier opinions, especially those of Mr. Justice Field, lay special stress upon this feature; but all the later cases, while agreeing that the grant is *in praesenti,* say, with equal emphasis, that it gave but an *inchoate* right, and title did not pass until the lands were identified by the Secretary of the Interior, or by the States first and then approved by him.

As to concrete decisions, the cases divide themselves into three classes.

1. Cases in which the States had sold the lands to others, and the Secretary had failed or refused to identify them as swamp or nonswamp. In these cases the court, *expressly on the ground that the Secretary had failed to perform his duty, and in order to prevent a failure of justice,* held that the true character of the lands could be shown by parole or other evidence, and if proven to be swamp, the swamp-land claimant should prevail.

Among the notable cases of this character are: *Railroad Co.* v. *Fremont County,* 9 Wall. 89; *Railroad Co.* v. *Smith,* 9 Wall. 95; *Wright* v. *Roseberry,* 121 U. S. 488. *Tubbs* v. *Wilhoit,* 138 U. S.

134, was of the same general character, though a resort to parole evidence was not found necessary in that case. Besides, the concrete decisions in the last two cases mentioned were not made under the swamp-land grant alone, but under that Act and the Act of July 23, 1866 (14 Stat. 218, c. 219), to quiet titles in California. This is shown in the former case at p. 511, *et seq.*, and in the latter by the whole opinion.

2. Cases in which the Secretary had made a *timely* identification of the lands as swamp or non-swamp, either by listing them as swamp or by patenting or certifying them under other grants.

In these cases the Secretary's determination is always held to be conclusive, and no other evidence is admissible to show the true character of the lands.

Chandler v. *Calumet & Hecla M. Co.*, 149 U. S. 79.
Ehrhardt v. *Hogaboom*, 115 U. S. 67.
French v. *Fyan*, 93 U. S. 169.
McCormick v. *Hayes*, 159 U. S. 332.
Rogers Locomotive Works v. *Emigrant Co.*, 164 U. S. 559.

It is apparent that the decisions last referred to are utterly inconsistent with the idea that an indefeasible title or right to all the lands actually swamp within their borders passed to the State immediately upon the passage of the swamp land granting Act; and it is just as clear that cases of the first class are exceptional, and apply only to

particular circumstances where the neglect of duty on the part of the land department made it necessary, in order to do justice between private claimants, to ascertain the actual character of the lands.

3. The third class of cases is just as inconsistent as the second with the theory that an indefeasible title or right passed to the State by the grant "*in praesenti.*"

They hold that even where the lands have been surveyed and the field notes have been agreed on as the test of swamp or nonswamp, it is still within the power of the Secretary, up to the actual issuance of the patent, to cause a resurvey and determination of the character of the lands to be made.

> *Michigan Land & Lumber Co.* v. *Rust,* 168 U. S. 589.
>
> *Brown* v. *Hitchcock,* 173 U. S. 473.
>
> *Niles* v. *Cedar Point Club,* 175 U. S. 300.
>
> *Little* v. *Williams,* 231 U. S. 335.
>
> *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District,* 232 U. S. 186.
>
> *Lee Wilson & Co.* v. *United States,* 245 U. S. 24.

In contrast with the general language of some of the earlier opinions, note the following by Mr. Justice Brewer in *Brown* v. *Hitchcock, supra* (p. 476):

> Under the Swamp Land Act the legal title passes only on delivery of the patent. So the statute in terms declares. The second section provides that the Secretary of the Interior "at the request of said Governor, cause a patent to be issued to the State

> therefor; and on that patent, the fee simple to said lands shall vest in the said State": *Rogers Locomotive Works* v. *American Emigrant Company*, 164 U. S. 559, 574; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 592. In this case the record discloses no patent, and *therefore no passing of the legal title.* Whatever *equitable rights or title* may have vested in the State, the legal title remained in the United States.

And, in *Chapman & Dewey Co.* v. *St. Francis, etc., supra* (p. 198), by Mr. Justice Van Devanter:

> But it is said on behalf of the Levee district that, even though the lands were not included in the patent, they passed to the State under the Swamp Land Act, independently of any patent, and thence to the district under the State Act of 1893. *The contention is not tenable.* The lands were never listed as swamp lands and their listing does not appear to have been even requested, doubtless because they were not surveyed. Assuming that in fact they were swamp lands, the State's title under the Swamp Land Act was at most inchoate and never was perfected.

The result of all these cases, therefore, is that, even under the original swampland grant, the States' rights prior to survey, identification, and patenting or certification were at most "inchoate," "not perfected." *There was no means by which the States could compel the Secretary of the Interior to cause executive officers of the government*

to identify, certify, or patent the swamp lands. He could not be coerced by mandamus or injunction. *Brown* v. *Hitchcock,* 173 U. S. 473; *Minnesota* v. *Hitchcock,* 185 U. S. 373; *Louisiana* v. *Garfield,* 211 U. S. 70; *Oregon* v. *Hitchcock,* 202 U. S. 60. And the United States itself has never given its consent to be sued by the States in respect to the swamp lands within their borders. *Oregon* v. *Hitchcock, supra.*

Now, a grant by the United States without consideration, not consummated by patent or any other instrument of title, "inchoate," *and not enforceable by any judicial or other process,* is certainly not of such dignity that the United States may not, in the performance of compelling moral obligations to its dependent wards, by treaties reserve a portion of those lands for their use and finally dispose of it for their benefit.

In the present case the fact is that before any patents were issued to the State for these lands, before any attempt by it or the land department to identify them as swamp or dry, even before any survey, the United States, recognizing that it had failed to make adequate provision for the future of these Indians, by solemn treaties established, out of lands formerly ceded but never actually vacated by them, new and enlarged reservations by language containing no exceptions and nothing whatever from which the Indians (or any white man) could have understood that the large areas of swamp land

within the boundaries named were not to become theirs as much as the dry lands.

Looking for the moment at the more technical side of the question the general rule is that while, as between rival private claimants under the general land laws, or under grants to the States, railroads, etc., the title when once passed by formal instrument relates back to the initiatory act, or to the date of the granting statute, *yet, as against the United States,* no right or title vests until payment is made for the lands or they are earned (being the equivalent of payment) by the doing of the things required of the grantee in fulfillment of the purposes of the grant. *Frisbie* v. *Whitney,* 9 Wall. 187; *Yosemite Valley Case,* 15 Wall. 77; *Shepley* v. *Cowan,* 91 U. S. 330.

The recent cases of *Payne* v. *Central Pac. Ry. Co.,* 255 U. S. 228; *Payne* v. *New Mexico,* 255 U. S. 367; *Wyoming* v. *United States,* 255 U. S. 489, are no exceptions to this rule. In the *Wyoming* case, the lands selected were paid for *at* the time of selection by the absolute conveyance to the United States of the base tract owned by the State; in the *New Mexico* case, the lands selected were paid for by the State's contemporaneous waiver of its right to other lands accrued under its grant but subsequently included within a national forest; and in the *Central Pacific* case, the lieu lands selected had already been earned (the equivalent of payment) by the construction of the road. In all three of these

cases everything required of the demanding parties by law and by the regulations of the Secretary had been fully performed, and there remained only the ministerial act of approval by the Secretary, and this, it was held, could not be withheld.

The present case is the first ever brought by the United States to recover swamp lands on any ground, and it is further differentiated by the fact that it is to recover Indian lands erroneously patented as swamp; and we can conceive of no valid reason why Frisbie v. *Whitney, supra, and the two cases cited with it do not apply.*

In view of the foregoing, we believe that the swamp-land grant was of no higher dignity and gave a right of no greater sanctity until the lands were surveyed and identified than the school grant itself, as to which this court, in a long line of decisions so familiar that it is unnecessary to cite them, has held that Congress may otherwise dispose of the lands up to the time the school sections are identified by actual survey. Certainly the inchoate right to unsurveyed, unidentified swamp lands was not superior to that trust, arising out of the Constitution itself, upon which the United States held the beds of navigable waters in the territories for the benefit of future States. And yet, that trust did not prevent the United States, before the admission of a State, from diverting portions of the beds of navigable waters to the purpose of fulfilling "international obligations" "or to carry out other public purposes appropriate to the objects

for which the United States hold the Territory." *Shively* v. *Bowlby,* 152 U. S. 1, 48. And, applying this doctrine, this court has upheld the power of the government, by an Indian treaty, to subject lands under navigable waters to an easement inconsistent with the full exercise of property and sovereign rights therein by the subsequently created State. *United States* v. *Winans,* 198 U. S. 371.

So that, tested by the rules above set forth, the United States had full power to otherwise dispose of these lands by treaty; and it did so dispose of them.

V

The act extending the swamp-land grant to Minnesota so modified its original terms as to clearly indicate that neither the legal title nor any vested equitable right was to pass until the issuance of patent

The Act of March 12, 1860 (12 Stat. 3, c. V), reads as follows:

> That the provisions of the act of Congress entitled "An act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits," approved September twenty-eight, eighteen hundred and fifty, be, and the same are hereby, extended to the States of Minnesota and Oregon: *Provided,* That the grant hereby made shall not include any lands which the Government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act.

SEC. 2. *And be it further enacted,* That the selection to be made from lands already surveyed in each of the States including Minnesota and Oregon, under the authority of the act aforesaid, and of the act to aid the State of Louisiana in draining the swamp lands therein, approved March second, one thousand eight hundred and forty-nine, shall be made within two years from the adjournment of the legislature of each State at its next session after the date of this act; and, as to all lands hereafter to be surveyed, within two years from such adjournment, at the next session, after notice by the Secretary of the Interior to the governor of the State, that the surveys have been completed and confirmed.

The exception in the first section of lands thereafter to be reserved, sold, or disposed of is inconsistent with the idea of an immediate passing of title, or even of an immediate vesting of an equitable right to any swamp lands at all; because any part, and no one could know in advance what part, of the swamp lands might be reserved, sold, or otherwise disposed of in strict accordance with the proviso.

The second section is even more significant. It is not only a modification of the Act of 1850 as to Minnesota and Oregon, but is an amendment of that Act affecting all the other States. It throws upon the States the burden and duty of making the selections; and if it means anything at all it means that the swamp lands must be selected within the times prescribed or not at all. Unless that is so,

the whole section would be wholly nugatory. But if the right to acquire the title to swamp lands depended upon the performance of future acts by the States, certainly they had acquired no vested right to any specific lands immediately on the passage of the Act.

But even if this provision were considered as meaningless or directory merely, in its application to the other States, it was an integral and original part of the Act of 1860, *and a modification of the original Act as extended to Minnesota and Oregon.* As to them, at least, the grant was in substance and effect an offer of the swamp lands to the two States to be accepted by selecting them as prescribed, and until so accepted no right, equitable or otherwise, vested.

If the Act was in any sense a grant *in praesenti,* then the lands revert to the United States on the failure of the State to select them within the prescribed time. This was expressly decided, under this statute, by Judge Deady in a case in Oregon. *Pengra* v. *Munz,* 29 Fed. 830, 834.

This, also, is the meaning given to the Act in the Revised Statutes of 1878, Sec. 2490. In that revision the direction to select within the times stated is expressly confined to the two States and *is made a part of the proviso* in the original first section, thus:

> The provisions of the act of Congress entitled "An act to enable the State of Arkan-

101. Pac. 171

> sas and other States to redeem" the swamp lands within their limits, approved September 28, A. D. 1850, extend to the States of Minnesota and Oregon: *Provided,* That the grant shall not include any lands which the Government of the United States may have sold or disposed of under any law, enacted prior to March 12, 1860, prior to the confirmation of title to be made under the authority of said act—and the selections to be made from lands already surveyed in each of the States last named, under the authority of the act aforesaid, shall have been made within two years from the adjournment of the legislature of each State, at its next session after the 12th day of March, A. D. 1860—and as to all lands surveyed or to be surveyed, thereafter, within two years from such adjournment, at the next session after notice by the Secretary of the Interior to the governor of the State, that the surveys have been completed and confirmed.

We can obtain a clearer view of the revised version by eliding all but the pertinent matter. The section (2490) will then read:

> The provisions of the Act * * * approved September 28, A. D. 1850, extend to the States of Minnesota and Oregon; *Provided,* That * * * the selections to be made from lands already surveyed in each of the States last named * * * shall have been made within two years from the adjournment of the legislature, etc., etc.

In other words, a promise of a grant is made if and when the States shall make the selections within the times prescribed.

It may be that when the selections have been made *as prescribed* and the patents issued, the rights of the two States relate back to the date of the granting Act, as against private parties claiming tracts of land under the general land laws. But the right of the Government to otherwise dispose of the lands by treaty before any steps whatever had been taken to carry into effect the promise of a grant seems unquestionable under all the authorities.

Aside from this, however, and as an independent matter, the fact is that the lands with which we are here concerned were not selected by the State within the times limited, nor for years thereafter. This is charged in the bill (Par. III, R. 8) and not denied in the answer (R. 62). Instead of a denial, a long explanation is given showing, in substance, that at a very early date the State agreed with the land department that the field notes of the Government surveys should govern, that the matter of preparing the selection lists was to be left to the Secretary, and that various plans for identifying the swamp lands were thereafter from time to time agreed upon and carried out. These allegations show that the State and the land department wholly ignored the special provisions of the Act of Extension, and proceeded in leisurely fashion according to the

usual practice as to swamp lands in States where the Act of 1850 prevailed without any modification.

Even if it be assumed that the Secretary of the Interior could waive, in behalf of the Government, the conditions contained in the Act of Extension, in so far as the lands of the United States were concerned, which seems to us doubtful, he certainly could not waive them in regard to lands secured to the Indians by solemn treaty stipulations. As we have shown, all the equities are with the Indians, and the State is without any equity at all; and it would perpetuate wrong and injustice to hold that any official of the United States could relax the strict requirements of the law to the prejudice of their superior and compelling equities. Indeed, the principles of relation of rights, estoppel, and waiver, are designed to preserve and protect equities and never to destroy them.

VI

The lands reserved to the Indians by the treaties of 1863–4 and 1867 are embraced by the express exception in section one of the act of extension

The language is:

> *Provided,* That the grant hereby made shall not include any lands which the Government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said Act.

These lands were reserved by treaties made "in pursuance of" the Constitution of the United

States, which is declared to be the supreme "law" of the land. We do not customarily refer to the constitution as "enacted," but rather as "adopted." But "enact" has both a broad and a narrow meaning. According to Webster's Revised Unabridged Dictionary, it means:

> to decree; to establish by legal and authoritative act; to make into a law; especially, to perform the legislative act with reference to (a bill) which gives it the validity of law.

The other dictionaries are to the same effect. Now, the Constitution was established "by legal and authoritative act"; it was "made into a law," and was therefore a "law heretofore enacted." We speak indifferently of a *statute,* as enacted, adopted or passed. If the draftsman in this case had said "in pursuance of any law heretofore adopted," the Act would have described the Constitution in the terms ordinarily employed. To confine this exception to a *statute,* merely because of the word "enacted," would seem to be narrow and extreme. If a "statute" or "act of Congress" alone was intended, it would have been more natural to have used one of those terms.

That such was the general understanding is shown by the fact that while the treaties were in the making; during the long period intervening between that and the final cessions under the Nelson Act; and in the course of the prolonged negotiations for those cessions and the cessions provided for by the unratified treaties made by the North-

west Commission, no one, anywhere, at any time, ever expressed the idea that the State had any right to these swamp lands.

And again we insist that the equities of this cause, as well as the honor and good faith of the United States, call with overpowering force for a broad, rather than a narrow, construction.

VII

The State was estopped by her silence while the two treaties were in the making and while the cessions under the Nelson Act were in course of negotiation

If ever there was a situation in which common fairness required anyone claiming an interest in the subject matter to speak out and make known his claim, it was when the two treaties restoring to the Indians a portion of the lands ceded by them in 1855 were in the making, and when the Nelson Act providing for the sale of those same lands for the benefit of the Indians was pending in Congress; and again when the negotiations, prolonged for weeks within the very borders of Minnesota, were going on to procure the assent of the Indians to that Act. The State was an integral part of the United States, which was making those provisions, yet she stood by in absolute silence and saw the Indians give up other and very valuable lands for the lands restored; saw the United States give its solemn pledge that all the lands within the boundaries of the tracts so restored should be Indian reservation lands; and saw the Indians cede those

lands, consent to the ultimate dissolution of their ancient tribal government and enter upon new and untried experiments from which there could be no recoil, upon the solemn pledge of the United States that *all* the ceded lands, except those embraced in valid and subsisting "preemption and homestead entries," should be sold for their benefit.

It is useless to cite cases upon estoppel. By every principle of common fairness and justice upon which estoppel is founded, the State's right to claim the swamp lands was forever foreclosed.

It may not here be said that the principle of estoppel does not apply to the Sovereign. The United States was a sovereign; the Indian Tribe was recognized as so far sovereign that treaties and collective agreements might be made with it. The State, too, was a sovereign; and as between selfrespecting independent sovereigns, at least, an estoppel growing out of such conduct would be enforced in the last resort by war, if there were no tribunal competent to declare and enforce it.

VIII

Even if the State had acquired a right, inchoate or otherwise, that right was divested by the two treaties

By the Constitution the whole treaty-making power is vested in the President and the Senate. There are no express limitations upon it. It therefore extends at least to all matters which, in the intercourse of nations and peoples, have customarily been the subjects of negotiation and settlement

by treaty. Some limitations are, of course, necessarily implied. One power vested in the general Government can not be made the means of destroying others, or of destroying the powers reserved to the States, or of placing one State on an inequality with the others. But a treaty ceding landed property of a State does none of these things. It leaves the sovereignty and status of the State absolutely untouched. If in a war one of the States were invaded and a part of it held against all our efforts to recover it, could we not make peace by a treaty ceding to the enemy the territory so held together with all the public property and lands therein whether national or State? Is it conceivable that the Government established by the Constitution is so devoid of the usual sovereign powers that we must forever remain in a state of war for want of power to cede lands which an enemy so holds? If so, the efforts of the Convention to form a national government, adequate to the exigencies which every nation is likely to encounter sooner or later, came to a lame and impotent conclusion. There might, of course, be an implied moral obligation to compensate the State for any of her lands so ceded in order to obtain for the whole nation the advantages of peace, but that would not affect the *power* of the nation to cede them.

Let us put the case in a little different way. The United States is a union of States, and without the States our present constitutional Government

could not exist. The people, when they ratified and adopted the Constitution through the action of their State conventions, constituted the President and the Senate both their own agents and the agents of the States to deal with foreign nations and make treaties with them and with the Indians. In a very real sense, therefore, every State is a party to every treaty. Her senators are a part of the body whose action makes the treaty finally binding on the United States; and the Constitution itself declares that the judges in every State shall be bound by treaties, anything in the constitution or laws of such State to the contrary notwithstanding. (Art. 6, Sec. 2.) *Missouri* v. *Holland,* 252 U. S. 416, 430, and cases there cited.

But the treaty-making power in relation to Indians, as long as we chose to exercise it, was no whit less broad than as to foreign nations. The power being the same, those in whom it is vested are the judges of the exigency requiring its exercise. These treaties were of benefit to the whole nation, in the sense that they fulfilled, or were intended to fulfill, moral obligations of the nation to the Chippewa Bands. At the same time, they were made upon valuable considerations. They were of especial benefit to Minnesota, for by each treaty the Indians ceded lands wanted for new settlers; and it is no uncertain inference that the underlying motive was furnished in large part by the pressure of the people of that State for the opening of more lands to acquisition by them. To paraphrase and reverse in application a somewhat

cynical paragraph in the Attorney General's opinion (25 Opin. 626, 631):

> We do not think any such supposed rights of the *State* should stand in the way of the fulfillment of the Government's treaty obligations to the *Indians*. "Equivalent money could be paid to the 'State' if any is due for swamp lands in the former reservation."

IX

If the State originally acquired any rights, inchoate or otherwise, she had forfeited them as to these lands long before any patents issued by a constitutional amendment tying the hands of her legislature and irrevocably diverting the swamp lands and their proceeds from the express purpose for which they were given her by the United States. After the patents issued she again forfeited the lands by actually diverting all the proceeds of these very lands from that purpose

The constitutional amendment was adopted in 1881, and the pertinent part is quoted, *ante,* page 49. We know, of course, that this court, in a series of decisions, has held that private parties, at least, can not set up a forfeiture of the swamp lands for failure to fulfill the purpose of the grant; that the fulfillment of the purpose is not a trust that follows the land into the hands of private parties; that such fulfillment is a matter resting in the *good faith* of the State and its *judgment* as to whether there is any need of reclaiming the land; and that a failure to fulfill may be taken advantage of, if at all, only by the United States. There were also intimations that in such a case an Act of forfeiture by

Congress would be necessary. *Emigrant Co.* v. *County of Adams,* 100 U. S. 61, 69; *Mills County* v. *Railroad Cos.,* 107 U. S. 557–565–566; *Hagar* v. *Reclamation District,* 111 U. S. 701; *United States* v. *Louisiana,* 127 U. S. 182. But in this instance the State exercised no good faith, no discretion, and no judgment at all, and allowed neither her legislature nor any of her officers to do so. *By the constitutional amendment she arbitrarily repudiated any obligation at all to carry out the purpose in respect to any lands whatever received or to be received under the grant.* Manifestly, this is a totally different case from any heretofore decided; and it seems astonishing that, in the face of that repudiation, the land department should have patented to the State another acre of swamp lands anywhere within her borders, to say nothing of the Indian lands here in question.

If it be said that we are here asking a forfeiture without an Act of Congress declaring it, the answer is that the United States does not here sue to recover lands for her own benefit, but lands held in trust to be sold for the Indians who are the absolute equitable owners, and whose rights may and should be enforced without awaiting any action by Congress. The United States is already charged with a trust and her officers with a duty to carry it out under treaties, agreements, and Acts of Congress already in existence; and in order to perform that duty, they not only may but must do everything necessary to that end.

The State's claim that she has fulfilled the purpose of the gift *in substance* is wholly baseless. What she has done is to drain the lands by assessing benefits upon swamp and other State lands, as well as private lands; pay the State assessments on State lands out of general revenues; add the increased value of the benefits to the high minimum price of the lands; sell them to private parties and turn the proceeds, including the value of benefits by drainage, into the school and charitable funds, there to be held forever undiminished, etc. This was a compliance neither with the letter nor the spirit of the granting Act, and is no defense whatever.

X

Small reservations having an exceptional status

A. The three Pillager and Winnibigoshish Reservations

By the treaty of 1863–4 only six of the nine small reservations established by the treaty of 1855 were ceded. See Arts. 1 and 2 (12 Stat. 1249). The three others, namely, those at Leech Lake, Winnibigoshish Lake and Cass Lake, remained as before and their continued existence was recognized in both sections; and they were administered as distinct reservations ever after until the acceptance of the Nelson Act, and then were ceded for the first and only time. What we have called the enlarged Leech Lake Reservation was simply thrown around and between them, leaving them intact.

As to these, therefore, there can be no question. They never have been public lands in any sense,

and were never subject to the swamp-land grant, even under the Secretary's decisions heretofore dealt with. They occupied exactly the same status as the great area first ceded from the Red Lake Reservation by acceptance of the Nelson Act; and as to that cession the Secretary decided that no swamp lands therein ever passed to the State (22 L. D. 388), and she never got any there.

Through accident or ignorance, however, some parts of the three reservations were patented as swamp to the amount of over 700 acres. (Exhibit B, R. 56.)

B. The Mille Lac Reservation

The history of this reservation was merely alluded to in the general statement, *ante*, page 19. A large body of land lying south of Mille Lac (thousand lakes) was ceded by the Chippewa Tribe by the treaty of July 29, 1837 (7 Stat. 536, Art. I). The north line of the cession, as finally located, ran through the lake. The permanent villages of this band were around the south side of the lake, and it was probably not understood at the time that they would be left on the ceded lands. They had been there, however, for generations; and up to 1855 neither the government nor anybody else (except some lumbermen) had thought of disturbing them. The treaty of 1855 recognized their right to remain there and established for them a small reservation. The lands had, however, evidently been surveyed, at least to the extent of running the township lines,

for the treaty of 1855 designated the lands then reserved by fractional township descriptions. (Art. II.) Thus the legal establishment of this reservation antedated the swamp-land grant of 1860. So that these lands also were not subject to that grant.

The Mississippi Bands ceded this reservation by the treaty of 1863, with a condition thus expressed (Art. XII, 12 Stat. 1251):

> *Provided,* That, owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites.

The previous good conduct thus rewarded was their support of the agent in the previous year when Hole-in-the-Day and his three hundred warriors moved to attack the Agency at Crow Wing.

The land department construed the proviso as meaning a mere temporary occupancy, not interfering with the survey and opening of the lands to settlement, and accordingly the surveys were made and many entries allowed. As shown by later decisions of this court, that action was erroneous. *United States* v. *Thomas,* 151 U. S. 577; *United States* v. *Mille Lac Chippewas,* 229 U. S. 498. See also *Fellows* v. *Blacksmith,* 19 How. 366. These entries were later suspended, and that status continued until the reservation was again ceded under the Nelson Act, with a proviso in Section 6 except-

ing from its provisions "any tract upon which there is a subsisting, valid, preemptive or homestead entry," and directing that such entries proceed to patent. (The exception, of course, had nothing to do with swamp lands.) After the cession, the remainder of the Mille Lac lands were opened to entry and disposed of under the public land laws, contrary to the terms of the cession. Later, under an Enabling Act, the Indians sued the United States in the Court of Claims for the value of all the lands thus disposed of. The case came to this court, which decided that the then existing suspended entries were covered by the exception above quoted, but that the disposal of the remainder of the lands under the homestead laws was in violation of the Nelson Act cession, and the Government was liable for their value. The latter disposal had been made under directions of two resolutions of Congress, as to which this court, by Mr. Justice Van Devanter, said (the *Mille Lac case,* p. 509):

> That the wrongful disposal was in obedience to directions given in two resolutions of Congress does not make it any the less a violation of the trust. The resolutions, unlike the legislation sustained in *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 307, and *Lone Wolf* v. *Hitchcock,* id. 553, 564, 568, were not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards, but were intended to assert, and did

> assert, an unqualified power of disposal over the lands as the absolute property of the Government.

That decision involved no swamp lands, but it is important here in its recognition of the trust created by the Nelson Act cession, and its emphatic assertion that even Congress, though it has plenary power to administer the lands of its Indian Wards *for their benefit,* can not give them away to white men.

For the same reasons, of course, Congress could not give them to a State, and much less could the Secretary of the Interior do that. So that this decision is authority for the proposition that no swamp lands retained in Indian reservations from a time prior to the Act of Extension could pass to the State. Nevertheless, and apparently by a mere error, over 700 acres of these Mille Lac lands were patented to the State on May 13, 1871. (Exhibit *C* to Complaint, R. 57.)

Discovering the mistake, the Secretary, in September of the same year, formally demanded the lands back from the Governor. The demand was not complied with, and was repeated July 15, 1915. (R. 8 and 62.)

Notwithstanding the long delay these lands or their value should now be restored to the Indians. As we have shown, neither limitation nor laches applies; and, in any event, the only remedy possible was an original suit, and the Government may

well be excused for declining to trouble this court in that way for only 700 acres of swamp land.

XI

The State should account for all that she has received or is to receive for lands sold by her, with interest; for the price of any minerals removed, if any, from lands sold with reservation of mineral rights; and for the price of the lumber or timber sold from lands still retained or sold after removal of the timber, with interest

In the bill the Government prays for the full *value* of the lands sold by the State and of the timber cut and removed. After fuller knowledge and a further examination of the statutes under which the sales were made by the State, it now seems to us that the ends of substantial justice will be subserved by an accounting on the principle above stated, especially in view of the high prices that must have been realized if those statutes were followed in making the sales. This will much simplify the accounting, if one is directed.

The principle itself was announced and applied by this court in *Southern Pacific R. Co.* v. *United States* (No. 1), 200 U. S. 341, 352–3. There it was said:

> Erroneously and by mistake the officers of the Government executed patents to the railroad company conveying the legal title to the lands. The railroad company accepted such title and subsequently conveyed the lands to parties who dealt with it in good faith. When by mistake a tract of land is

> erroneously conveyed, so that the vendee has obtained a title which does not belong to him, and before the mistake is discovered the vendee conveys to a third party purchasing in good faith, the original owner is not limited to a suit to cancel the conveyances and re-establish in himself the title, but he may recover of his vendee the value of the land up to at least the sum received on the sale, and thus confirm the title of the innocent purchaser. The conveyance to the innocent purchaser is equivalent to a conversion of personal property. Irrespective, therefore, of the act of Congress the Government had the right, when it found that these lands had been erroneously patented to the railroad company and by it sold to persons who dealt with it in good faith, to sue the railroad company and recover the value of the lands so wrongfully received and subsequently conveyed.

The same principle is applied in cases where title to public lands is obtained by fraud and then passed to an innocent purchaser, or where such lands are still held by the fraudulent patentee, and a suit to cancel the patent and recover them is barred by limitation. The Government recovers the value of the lands, or, at its election, the price for which they were sold. *United States* v. *Whited & Wheless,* 246 U. S. 552, 563; *United States* v. *Koleno,* 226 Fed. 180; *Bistline* v. *United States,* 229 Fed. 546; *Union Coal & Coke Co.* v. *United States,* 247 Fed. 106.

The fact that the United States was bound by the Nelson Act to realize for the Indians only $1.25 per acre for the swamp lands (which would have been classed as "agricultural lands" if the State had not intermeddled) in no wise limits the recovery as against her. She can retain nothing that has come to her as a result of intermeddling with property to which she had no right whatever.

The same principle would control the accounting for timber cut and sold by her from swamp lands which she still retains. And if it should appear, when her promised disclosures are made, that she sold timber from some of the lands and afterwards sold the lands themselves, she must of course account for what she received for both timber and land. As the Government, up to the filing of the answer, was ignorant of the reservation of minerals to the State, it did not specifically pray for the value of minerals removed, and the State made no disclosures regarding them. But if any have been mined and removed she should account therefor on the same principle.

We assume that a decree on these principles will completely extinguish the rights of the United States in the land and timber sold. The fact that the lands have been sold under long-time contracts, the price to be paid in installments, some of which are not yet due the State, will present no real difficulty. The decree will in effect confirm the *sale,* whether a State patent has issued or not. The

price of the lands being fixed at the time of sale, the principal amount to be recovered will be apparent.

The State is liable for interest on the selling price of the lands from the date of each sale. Under the contracts of sale, she herself receives interest. (R. 72.) The money received in cash and on the installments as they fall due is invested in bonds which return interest. (R. 73.) As she has received interest on moneys which belong to the trust and not to her, she must pay interest, on the principle above stated.

In this country, interest is the natural growth, or incident, of money, and bears the same relation to it that rent does to land. *Woerz* v. *Shumacher,* 161 N. Y. 534, 536; *Spalding* v. *Mason,* 161 U. S. 375, 395; *Stewart* v. *Barnes,* 153 U. S. 456, 462; 22 Cyc. 1473.

This case is not like those in which the Government, suing in its own behalf, under Acts of Congress forfeiting land grants, is denied interest because the acts of forfeiture and cognate legislation show that interest was not to be exacted (*Southern Pacific R. R. Co.* v. *United States,* 228 U. S. 618); or like those in which the Government is sued under enabling Acts which do not provide for interest or show that it was not contemplated.

Under her contracts with purchasers and on the funds invested in bonds the State receives 4 per cent, but that is not the true criterion. Under the Nelson Act (sec. 7) the Indians are to receive 5 per cent on the trust fund placed to their credit in the

Treasury. But the true criterion is, we think, the legal rate which has prevailed in the State during the period the moneys have been withheld.

CONCLUSION

If the issues now submitted shall be decided in favor of the United States, we suggest that the State be required to make the promised disclosures before a Master or Auditor as to the lands sold by her and the lands still retained; and, as to the lands sold, the dates of sale, respectively, the price, the terms of sale, etc.; whether any minerals have been removed from lands sold with reservation of mineral rights, and, if any have been removed, the quantities and the prices realized therefor; and the quantities of timber removed from lands still retained by the State, or sold after such removal; the dates of removal and the prices realized; together with such other particulars as may be necessary to a determination of the amounts now due the United States; with leave to the United States to controvert or supplement such disclosures by any available evidence, in case it deems proper to do so.

WILLIAM D. MITCHELL,
Solicitor General.

B. M. PARMENTER,
Assistant Attorney General.

W. W. DYAR,
Special Assistant to the Attorney General.

SEPTEMBER, 1925.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 17, ORIGINAL

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THE STATE OF MINNESOTA

STIPULATION

After the bill of complaint and answer herein had been served and filed, the parties agreed that the cause should be submitted to the court upon stipulated facts. The negotiations as to what should be included therein were carried on largely by correspondence between counsel. After the various items of evidence to be included in the stipulation had thus been agreed upon, it was left to the Department of Justice to arrange the contents of the stipulation and to prepare the record herein and deliver it to the clerk for printing. In so doing, the Department of Justice accidentally omitted therefrom the following item:

> It is hereby stipulated that the facts recited in the answer of the State of Minnesota, under parts numbered III and IV (which said part IV begins at the top of page 66 of the printed transcript of record),

and in Exhibits A, B, and C are true, and further that the State of Minnesota has, under laws enacted by its legislature for that purpose, sold the major portion of the lands so patented to it and that in the handling of said lands, involving appraisals, sales, collection of principal and interest and the keeping of records, the state has expended many thousands of dollars.

That said lands have been and are sold on long time contracts, a copy of one thereof being hereto attached and made a part hereof, marked Exhibit B. Most of the contracts heretofore entered into have a number of years yet to run. Under these contracts purchasers are required to make annual payments, and when full payment is made, patent from the state issues. The proceeds have been and will continue to be placed in the trust funds of the state pursuant to the aforesaid provisions of section 2 of Article 8 of the state constitution. These provisions require that such funds forever remain inviolate and undiminished, authority being given thereby to invest the same in certain specified securities. In the exercise of this authority, the legislature has directed that said funds be loaned on the bonds of the United States, the state of Minnesota, and of the counties, towns, cities, villages, and school districts thereof. This direction was first made many years ago, since which time the law has been in minor details modified. The law as it now stands is found in Session Laws of Minnesota for

1921, chapter 516, a copy of which is hereto attached and made a part hereof, marked Exhibit C. Proceeding under this legislative direction and laws enacted providing the necessary machinery for loaning the funds, the bulk of said funds are kept invested in the bonds of said political subdivisions, and principally in the bonds of school districts for the erection and equipment of school houses. Of said funds, aggregating about $8,000,000, approximately $6,000,000 are now invested in the bonds of the municipalities of the state.

It is therefore stipulated and agreed that the foregoing matter may be included in the stipulation of evidence heretofore made between the parties hereto and included in the printed transcript of record herein; and application is hereby made to the court for an order allowing the filing of this stipulation and allowing the amendment of the record herein in the particulars hereinbefore set forth.

Dated January 5, 1926.

THE UNITED STATES OF AMERICA,
By WILLIAM D. MITCHELL,
Solicitor General.

THE STATE OF MINNESOTA,
By CLIFFORD L. HILTON,
Attorney General.

G. A. YOUNGQUIST,
Assistant Attorney General.

MONTREVILLE J. BROWN.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 17, ORIGINAL

UNITED STATES OF AMERICA, COMPLAINANT

v.

STATE OF MINNESOTA

MOTION FOR THE ENTRY OF DECREE

Now comes the Solicitor General in behalf of the United States and in behalf of the State of Minnesota and moves the court that a decree be entered in accordance with the form submitted herewith.

(Signed) WILLIAM D. MITCHELL,
Solicitor General.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 17, ORIGINAL

UNITED STATES OF AMERICA, COMPLAINANT

v.

STATE OF MINNESOTA

STIPULATION SUBMITTING FORM OF DECREE

Now come the parties and submit the accompanying form of decree for entry by the Court.

It is stipulated that the area of 706 acres described as within the Leech Lake, Winnibigoshish, and Cass Lake Reservations, as to which the court found the United States entitled to a decree canceling the patents, or to a judgment for the value of such lands as have been sold, may be reduced 88.80 acres, for the reason that no patents were issued to the state for the two tracts described in the next to the last paragraph of the form of decree herewith.

(Sgd.) WILLIAM D. MITCHELL,
Solicitor General.

(Sgd.) CLIFFORD L. HILTON,
Attorney General of Minnesota.

(Sgd.) G. A. YOUNGQUIST,
Assistant Attorney General of Minnesota.

(Sgd.) MONTREVILLE J. BROWN,
Solicitors for Defendant.

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 17, ORIGINAL

UNITED STATES OF AMERICA, COMPLAINANT

v.

STATE OF MINNESOTA

FINAL DECREE

This cause coming on to be heard upon the submission by the parties of a form of decree herein, and for the purpose of carrying into effect the conclusions of the court as stated in its opinion herein (March 1, 1926),

IT IS ORDERED, ADJUDGED, AND DECREED that the patents issued by the United States be canceled as to the following described lands patented to the State of Minnesota included within the 706 acres in the Leech Lake, Winnibigoshish, and Cass Lake Reservations described in said opinion.

	Acres
Township 146 N., R. 26 W.:	
Lot 3, Sec. 4	38
Lot 4, Sec. 4	37.60
SW¼ NE¼ Sec. 4	40
SE¼ NW¼ Sec. 4	40
NE¼ SE¼ Sec. 4	40
NW¼ SE¼ Sec. 4	40
Township 142 N., R. 28 W.:	
SE¼ NE¼ Sec. 21	40
SW¼ NW¼ Sec. 22	40

Township 147 N., R. 29 W.:	Acres
Lot 10, Sec. 24	37.10
Lot 11, Sec. 24	43.05
Lot 1, Sec. 25	60.80
	456.55

It appearing to the court that the State has sold the said lands hereinafter described, it is further ORDERED, ADJUDGED, AND DECREED that the United States have and recover the value of said lands and timber thereon, in the sum of $250.81 as follows:

Lot 2, Sec. 6, T. 143 N., R. 27 W.: 43.20 acres at $1.25 with 10 M feet Norway Pine at $4.00 per M	$94.00
SE¼ NW¼ Sec. 21, T. 142 N., R. 28 W.: 40 acres with 2 M feet white pine at $5.00 per M	60.00
NE¼ NE¼ Sec. 22, T. 142 N., R. 28 W.: 40 acres at $1.25	50.00
Lot 1, Sec. 23, T. 142 N., R. 28 W.: 37.45 acres at $1.25	46.81
Total 160.65 acres, of the value of	250.81

It appearing to the court that no patent was issued to the SE¼ of the NW¼ of Sec. 22, T. 142 N., R. 28 W., containing 40 acres, and to Lot 5 of Sec. 2, T. 141 N., R. 30 W., containing 48.80 acres, the area of 706 acres is reduced accordingly.

As to the remaining 151,418.18 acres described in the complaint, it is ORDERED, ADJUDGED, AND DECREED that the bill be, and it is hereby, dismissed.

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No. 17, Original

In the Supreme Court of the United States

OCTOBER TERM, 1925

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THE STATE OF MINNESOTA

BRIEF FOR MINNESOTA

CLIFFORD L. HILTON,
Attorney General of Minnesota.

G. A. YOUNGQUIST,
Assistant Attorney General of Minnesota.

MONTREVILLE J. BROWN,
Solicitors for Defendant.

CHARLES R. PIERCE,
of Counsel.

Dow-Arneson Co., St. Paul.

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OCTOBER TERM, 1925

No. 17, Original

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THE STATE OF MINNESOTA

BRIEF FOR MINNESOTA

PRELIMINARY STATEMENT

By the Treaty of 1855 (10 Stat. 1169), the Mississippi, Pillager and Lake Winnibigoshish bands of Chippewa Indians ceded, sold and conveyed to the United States all their right, title and interest in and to lands then owned and claimed by them in the Territory of Minnesota included within boundaries therein set out. In consideration of and in full compensation for the cession made, the United States agreed and stipulated to make payments of money to and to expend money and make provision in behalf of the Indians, all as set forth in the treaty. The lands so ceded are shown in blue on the map designated "Minnesota 1"

made a part of the record. The area ceded bears the number 357. By virtue of the treaty, title to these lands, save eight small tracts reserved for the future homes of the Indians, which are shown on the map aforesaid in green and pink, passed to the United States free of any and all Indian rights. Such lands then became in 1855, public lands of the United States in the absolute sense.

The validity of this treaty was recognized by this Court as late as 1914, Johnson v. Gearlds, 234 U. S. 422, 34 Sup. Ct. 794, 58 L. ed. 1383.

Minnesota was admitted as a state in 1858 (Act of May 11, 1858, Chapter 31, 11 Stat. 285).

The status of the ceded lands remained unchanged until 1860. Prior thereto, and in 1850, Congress made a grant of all public lands swamp in character to the states (9 Stat. 519). In 1860 Congress extended the Act of 1850 to include the states of Oregon and Minnesota (12 Stat. 3). The Act of 1850 was so extended with modifications. These will be considered during the course of the argument. The Act of 1850 contained the words: "* * * The whole of those swamp and overflowed lands * * * shall be, and the same are hereby, granted to said state"; and the Act of 1860, these words: "* * * the grant hereby made * * *." By virtue of the use of these words, these grants have always been construed as grants in praesenti. Whether the grant to Minnesota was lost through rescission, forfeiture or something else raises questions for argument. However this may be, it must be conceded, it seems to us, that upon the passage of the Act of 1860, any title the United States may have had in and to the lands ceded to it by the Treaty of 1855, became and was thereafter subject to the grant of swamp lands to Minnesota. The ceded lands were public lands of the United States in 1860. Upon the passage of the Act of 1860, so much of these lands as were swamp in character passed from the United States to Minnesota, identification

and patenting being required to perfect title in the state.

Such was the situation in 1863 when the treaty of that year was concluded with the aforesaid bands of Indians and ratified and proclaimed (12 Stat. 1249). By the terms of this treaty, the Indians ceded five of the small reservations created under the Treaty of 1855 shown in pink on the map "Minnesota 1" and numbered 453, 456, 455 (includes two reservations) and 457. The treaty set apart for the future homes of the Indians lands embraced within certain boundaries. The area was situated in the north central part of Minnesota, is shown in pink on the map "Minnesota 2" and bears the number 507. The three reservations created in the third clause of the second article of the Treaty of 1855 for the Pillager and Lake Winnibigoshish bands, shown on the map in mauve and numbered 358, 359 and 360, were apparently left untouched. The area so set apart was enlarged by the Treaty of 1864 (13 Stat. 693) to include a strip of land to the northwest, shown on "Minnesota 2" in pink, and also numbered 507.

Under the Treaty of 1867 (16 Stat. 719), the Indians ceded all of the lands reserved to them under the Treaties of 1863 and 1864 to the United States, reserving a tract therein described by metes and bounds and shown on "Minnesota 2" in green, and bearing the number 508. In consideration of the cession,

> "In order to provide a suitable farming region for the said bands, there is hereby set apart for their use a tract of land, to be located, etc."

The first of these two reservations became known as the Enlarged Leech Lake Reservation, and the second as the White Earth Reservation. The White Earth Reservation is shown on "Minnesota 2" in blue, and bears the number 509. Two large maps of these reservations will be found in the record.

The swamp lands here involved are those situated within the boundaries of the Enlarged Leech Lake Reservation and the White Earth Reservation. They are shown in pink on the two

large maps of these reservations just referred to.

These reservations, as fixed by the Treaty of 1867, except for some additions made by executive orders dated October 29, 1873, November 4, 1873 and May 26, 1874, remained unchanged until the cession made pursuant to the Act of 1889, the Nelson Act (25 Stat. 642). The additions made in 1873 and 1874 are shown on "Minnesota 2", the same constituting the small tracts included within yellow boundary lines. They bear the numbers 549, 550, 567 and 568. Under the Nelson Act, the Indians ceded all of the Enlarged Leech Lake Reservation, together with the small Pillager and Winnibigoshish Reservations enclosed within its boundaries, and together with the additions made by executive orders; all of the Mille Lacs Reservation; four townships off the east side of the White Earth Reservation; about 2,200,000 acres of the Red Lake Reservation; and some small reservations in the northern part of the state. The ceded tracts are shown on the map "Minnesota (northern portion)": The Enlarged Leech Lake Reservation in mauve, numbered 710, the White Earth in green, numbered 708, the Red Lake in blue, numbered 706.

The Nelson Act provided:

> "For a complete cession and relinquishment in writing *of all their title and interest in and to all** the reservations of said Indians in the State of Minnesota."

The cession was made to the United States in trust. The lands ceded were to be sold for the exclusive benefit of the Indians. The act provided that all moneys accruing from the disposition of the land should be placed in the treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, the fund to draw interest at the rate of five per cent per annum for a period of fifty years, the

*Italics where appearing are ours.

interest to be paid annually to and for the benefit of the Indians, and the permanent fund to be disbursed among them at the end of the fifty-year period.

The act provided for a survey of all the lands and an appraisal of the timber lands, and a sale thereof in accordance with its provisions.

The lands were surveyed and the surveys disclosed numerous tracts of land swamp in character. Following the surveys, Minnesota made and prosecuted before the Commissioner of the General Land Office, and thereafter before the Secretary of the Interior, claims to these swamp lands, basing her claims on the Act of 1860 extending the Swamp Land Act of 1850 to her. As a result of these proceedings, the Secretary of the Interior, recognizing the claims of Minnesota as valid, patented the bulk of the lands to Minnesota, the first patent being issued in 1900 and the last in 1912. The lands so patented comprised in all approximately 152,124.18 acres.

Following the patenting of the lands to Minnesota, she proceeded under her constitution and laws enacted pursuant thereto. to sell these lands, including timber lands, to private parties. The bulk of them have been so disposed of, and were so disposed of prior to the institution of this suit.

On the claim that the Secretary of the Interior erroneously patented the lands to Minnesota, the Government, twenty-three years after the issuance of the first patent and eleven years after the issuance of the last patent, instituted this suit. The Government seeks to recover from Minnesota the value of the lands sold by her and a cancellation of the patents covering the lands not yet disposed of.

The foregoing is not submitted as a complete statement of facts involved and of importance here, but for the purpose of presenting in a brief way the history of the situation with particular reference to the status of the lands in question at various times from the Treaty of 1855 to the commencement of the suit.

This, we believe, will aid to a better understanding of the points upon which we rely for a favorable decision herein. Other facts of equal importance will be considered during the course of the argument.

MINNESOTA'S CONTENTIONS

1. The suit is one against the State of Minnesota by citizens thereof; and as a consequence the court is without jurisdiction to entertain the same.

2. The suit, if viewed as one by the United States against Minnesota to cancel patents, is barred by the statute of limitations.

3. The swamp land grant was one in praesenti; and upon perfection of title, title relates back to the date of the grant.

4. The character of the grant with respect to its application to Minnesota was not changed by the Act of 1860.

5. The act as extended to Minnesota was administered, and with particular reference to the lands in question, in strict accord with the construction of many years' standing placed thereon by those charged with the duty of administering the same.

6. The construction placed on the grant by the Interior Department is in accord with the true intent and meaning of the act; if doubt exists as to this, the grant having been consistently administered in accordance therewith, such construction should be accepted by the court.

7. The Treaties of 1863, 1864 and 1867 did not operate to divest Minnesota of title to the lands in question.

8. The lands in question did not pass to the United States as a result of cessions made pursuant to the Nelson Act (25 Stat. 642) for disposition for the benefit of the Indians or otherwise.

Contentions with respect to the diversion by Minnesota of proceeds derived from the sale of swamp lands, estoppel and equities will also be made and argued.

JURISDICTION

This suit is one against the State of Minnesota by citizens thereof; and as a consequence, the Court is without jurisdiction to entertain the same.

The lands involved here have all been patented to the state. The state has sold a large portion of them to private parties who are holding them under either patent or contract for patent from the state. With respect to the lands sold by the state, plaintiff seeks to recover the value thereof. As to the unsold lands, a decree canceling the patents is sought.

(1) *Suit for Money Judgment.*

This suit cannot be prosecuted as one to cancel patents covering lands sold by Minnesota for the reason that the state's grantees are not parties to the litigation. Had they been made parties, the court would for that reason be without jurisdiction. This is conceded by plaintiff at page 2 of its brief, where the case of California vs. Southern Pac. Ry. Co., 157 U. S. 229, 15 Sup. Ct. 591, 39 L. ed. 683, is cited. So plaintiff seeks to recover the value of these lands from Minnesota. For whom is this recovery sought? The United States? No. Assuming a recovery, the United States will not be the gainer to any extent whatever. Every dollar will go to the Indians; they, and they alone, will profit in the event of a recovery. This is conceded time and time again in plaintiff's brief; and must necessarily be conceded in view of the provisions of the Nelson Act. The United States is immune from suit at the instance of the Indians; it has assumed no responsibility as in the case of Minnesota vs. Hitchcock, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. ed. 954. Its situation will not be changed in the slightest, no matter how the litigation is decided. The suit is one for the sole and exclusive benefit of the Indians. The United States is a nominal party—the conduit through which the litigation is being conducted. The Indians are the real, and the only real, parties in

interest; and the suit is one by them against Minnesota. When the bill was filed, ninety-eight per cent of these Indians were citizens of Minnesota (R. p. 458); and now they are all citizens thereof (Act of June 2, 1924, C. 233, 43 Stat.). The court lacks jurisdiction to entertain the suit, for it is without jurisdiction to entertain a suit by persons against the state of which they are citizens.

> *Hans* v. *Louisiana*, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. ed. 849;
> *Hollingsworth* v. *Virginia*, 3 Dall. 378, 1 L. ed. 644;
> *Ex Parte Madrazzo*, 7 Pet. 625, 8 L. ed. 808;
> *Chandler* v. *Dix*, 194 U. S. 590, 24 Sup. Ct. 766, 48 L. ed. 1129;
> *Lankford* v. *Platte Iron Works*, 235 U. S. 461, 35 Sup. Ct. 173, 59 L. ed. 316;
> *American Water Softener Co.* v. *Lankford*, 235 U. S. 496, 35 Sup. Ct. 184, 59 L. ed. 329.

It is true that the United States has brought many suits in its own name for and on behalf of Indians, in some as guardian, and in others as trustee. And the courts have taken jurisdiction of such suits. Some of them are cited on page 54 of plaintiff's brief. In none of the cases so cited, and in no case that we have been able to find, has the United States sued a state for the benefit of Indians, to say nothing of a suit for the sole and exclusive benefit of Indians who happen to be citizens of the state sued. The court approached the question in Minnesota vs. Hitchcock, supra, where this was said:

> "If whether a suit is one against a state is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question of the

effect of the judgment or decree which can be entered.

"But, it may be said, that the United States has no substantial interest in the lands; that it holds the legal title under a contract with the Indians, and in trust for their benefit. This is undoubtedly true, and if the case stood alone upon the construction of the treaty between the United States and the Indians, there might be substantial force in this suggestion. But Congress has, for the Government, assumed a personal responsibility. On March 2, 1901, it passed the following act: * * *." (P. 387, 185 U. S.)

(2) *Suit to Cancel Patents.*

The character of the suit is the same as to lands not yet sold by Minnesota. Plaintiff seeks to recover these lands. If they are recovered, plaintiff will be required to turn them into cash for the Indians. They are the only ones who will profit by a cancellation of the patents. The suit, in so far as it is one to cancel the patents, is one by the Indians against Minnesota.

With respect to the suit, viewed both as one to recover damages and one to cancel patents, the United States cannot sue any more than a state can sue another state for and on behalf of its citizens where such suing state is not interested in the litigation in its proprietary capacity.

New Hampshire v. Louisiana; New York v. Louisiana, 108 U. S. 76, 2 Sup. Ct. 176, 27 L. ed. 656;

Louisiana v. *Texas,* 176 U. S. 1, 20 Sup. Ct. 251, 44 L. ed. 347;

North Dakota v. *Minnesota,* 263 U. S. 365, 44 Sup. Ct. 138, 68 L. ed. 365.

(3) *Effect of Statute of Limitations on Situation.*

Where a controversy exists capable of judicial solution between the United States and a state, the United States may invoke the original jurisdiction of this court. United States v. Texas, 143 U. S. 644. Here the United States contends that cer-

tain of her officers patented certain lands to Minnesota without authority of law; Minnesota contends that the patents were legally issued. If this be the real controversy, the jurisdiction of the court is limited to a consideration thereof; it extends no further. The claims of the third parties, the Indians, cannot be considered except as a determination thereof may be necessary to an adjustment of the dispute between the United States and Minnesota, for, as we have pointed out, the court cannot take jurisdictional cognizance thereof; if the suit be one to adjust Indian rights, it is one by them against the state of which they are citizens and the court is without jurisdiction. Treating the suit, then, as one between the United States and Minnesota for an adjudication of the dispute between them, it is barred by the statute of limitations. It is one to cancel patents issued by the United States to Minnesota, and was not commenced within six years following the issuance thereof. Act of March 3, 1891 (26 Stat. 1096, 1097, ch. 561, § 8).

We have considered the cases of Northern Pacific Railway Co. v. United States, 227 U. S. 355, 33 Sup. Ct. 368, 57 L. ed. 544, and La Roque v. United States, 239 U. S. 62, 36 Sup. Ct. 22, 60 L. ed. 147, cited in plaintiff's brief; but we fail to see that these cases in any way militate against the contention we here make.

The force and effect given to the statute of limitations, Act of March 3, 1891, by the court in the case of Cramer v. United States, 261 U. S. 219, 43 Sup. Ct. 342, 67 L. ed. 622, clearly demonstrates the nonsustainability of this litigation. In this case the court, speaking through Mr. Justice Sutherland, said:

> "The suit is not barred by the Act of March 3, 1891, chap. 561, § 8, 26 Stat. at L. 1095, 1099, limiting the time within which suits may be brought by the United States to annul patents.
>
> "The object of that statute is to extinguish any right the *Government* may have in the land which is the subject

> of the patent, not to foreclose claims of third parties. Here the purpose of the annulment was not to establish the right of the United States to the lands, but to remove a cloud upon the possessory rights of its wards. * * *." (P. 233, 261 U. S.).

Here cancellation of patents to certain of the lands in question is sought. Suit was not brought until the statute had run. The running of the statute extinguished such right, title and interest as the Government may have had in and to the lands patented. If the suit were simply one to reinvest the United States with title, it would be barred. The right, title and interest of the United States in and to these lands having expired, the only possible interest therein which can be here involved, as between the United States and the Indians, is that of the Indians. The suit is of necessity one solely for the protection of the interest, or purported interest, of these Indians; it cannot be for the protection of any right, title or interest of the United States, for the United States now has no right, title or interest; the running of the statute extinguished any and all claims the United States may have had in and to the lands. The Indians are now the only parties, as between them and the United States, with any possible interest in the lands. They are the only ones interested as plaintiffs in this litigation; and the litigation is being prosecuted solely and exclusively for their benefit. On no other theory can the statute of limitations be avoided; and on this theory the litigation must fail for want of jurisdiction in the court.

Assuming for the sake of argument that the suit is maintainable by the United States, the Minnesota statute of limitations applies, the suit being one against Minnesota for the sole benefit of the Indians.

Curtner v. United States, 149 U. S. 662.

This statute would bar the suit as to all lands patented to Minnesota fifteen years prior to the commencement of such

suit, for the statute provides that no action for the recovery of real estate or the possession thereof shall be maintained unless it appears that the plaintiff was seized or possessed of the premises in question within fifteen years before the beginning of the action.

General Statutes of Minnesota 1923, Section 9187.

MERITS

I.

The swamp land grant was one in praesenti; and upon perfection of title, title relates back to the date of the grant.

In plaintiff's brief it is stated that the decisions of this court with respect to the character of the swamp land grant are hard to reconcile. We encounter no great difficulty in harmonizing the decisions. The court characterized the grant in the case of Wright vs. Roseberry, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. ed. 1039, and since then has consistently ruled, in harmony therewith, the grant to be one in praesenti. In the Wright vs. Roseberry case (hereinafter referred to as the Roseberry case) the court held that a state did not acquire perfect title until identification. By reason of later decisions, the rule now is that perfect title does not vest until issuance of patent. We attach no importance to this. It is immaterial whether perfect title vests upon identification or upon issuance of patent; for under all the decisions the rule is that upon perfection of title, whether upon identification or issuance of patent, the title so perfected relates back to the date of the grant.

The Roseberry case involved the Act of 1850 and its application to certain lands in California. Patents to these lands were issued to settlers under the Preemption Laws of 1866, 1867, 1868 and 1871, upon declaratory statements made in 1864. Following this and in 1872, the lands were identified as swamp in character. A dispute arose between those claiming under such

patents and those claiming under the transfers from California. The lands had never been certified or patented to the state as swamp. The decision of the court was that, upon proof that the lands were swamp as of the date of the Act of 1850, there should be judgment in favor of those claiming under the state. The grant of 1850 was held to be one in praesenti; and that upon identification title becomes perfect as of the date of the grant.

The court, speaking with reference to the character of the grant, said:

> "The language of the first section of the act indicates a grant in praesenti to each state of lands within its limits of the character described. Its words 'shall be and are hereby granted' import an immediate transfer of interest, not a promise of a transfer in the future. It was only when the other sections of the act were read that a doubt was raised as to the immediate operation of the act. One the one hand, it was contended that these sections postponed the vesting of title in the state until the lands granted were identified, and a patent of the United States for them was issued. On the other hand, it was insisted that effect must be given to the clear words of the granting clause of the first section, which, ex vi termini, import the passing of a present interest, and that, in consistency with them, the other provisions of the act should be regarded as simply providing the mode of identifying the lands, and furnishing documentary evidence of their identification, and not as a limitation upon vesting the right to them in the state, as this would make the investiture dependent upon the request of the governor, and not upon the act of Congress. It was also urged that identification of the lands could be made in a majority of instances from simple examination of them, and that no policy of the government could be advanced by postponing the passing of the title until the identification by the Secretary of the Interior; and that the clause providing, that upon the issue of the patent the fee should

pass, was merely declaratory of the nature of the title, the patent operating merely by way of further assurance. (P. 496-97, U. S. 121).

"The question thus brought to the attention of the department, under whose supervision the act was to be carried into effect, was one upon which men might very well differ, but after its solution had been reached, and the conclusion was acted upon, necessarily affecting titles to immense tracts of land, there should be the clearest evidence of error, as well as the strongest reasons of policy and justice controlling, before a departure from it should be sanctioned." (P. 497, 121 U. S.)

* * *

"It is plain that the difficulty of identifying the swamp and overflow lands could not defeat or impair the effect of the granting clause, by whomsoever such identification was required to be made. *When identified, the title would become perfect as of the date of the act. The patent would be evidence of such identification and declaratory of the title conveyed.* It would establish definitely the extent and boundaries of the swamp and overflowed lands in any townsip, and thus render it unnecessary to resort to oral evidence on that subject. It would settle what otherwise might always be a mooted point, whether the greater part of any legal subdivision was so wet and unfit for cultivation as to carry the whole subdivision into the list. The determination of the secretary upon these matters, as shown by the patent, would be conclusive as against any collateral attacks, he being the officer to whose supervision and control the matter is especially confided. The patent would thus be an invaluable muniment of title and a source of quiet and peace to its possessor. But the right of the state under the first section would not be enlarged by the action of the secretary, except as to land, not swamp or overflowed, contained in a legal subdivision, as mentioned in the fourth section; nor could it be defeated, in regard to the swamp and overflowed lands, by his refusal to have the required list made out, or the patent issued, notwithstanding the delays and em-

barrassments which might ensue." (P. 500, 121 U. S.)

* * *

"The result of these decisions is, that the grant of 1850 is one in praesenti, passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; * * *." (P. 509, 121 U. S.)

The conclusion of the court in this case was based largely on prior decisions and influenced to some extent, no doubt, by the interpretation which had always been placed on the act by the Secretary of the Interior. The decisions of the courts and the rulings of the Interior Department were exhaustively reviewed. All of them were shown to be supportive of the conclusion reached; there had been unanimity of opinion on the subject.

Some of the cases considered were:

R. R. Co. vs. Smith, 76 U. S.)9 Wall.) 95, 19 L. ed. 599;
French vs. Fyan, 93 U. S. 169, 23 L. ed. 812;
Rice vs. Sioux City & St. Paul R. R. Co., 110 U. S. 695, 4 Sup. Ct. 177, 28 L. ed. 289;
Martin vs. Marks, 97 U. S. 345, 24 L. ed. 940;
Fletcher vs. Pool, 20 Ark. 100;
Branch vs. Mitchell, 24 Ark. 431;
Ringo's Exr. vs. Rotan's Heirs, 29 Ark. 56;
Owens vs. Jackson, 9 *Cal. 322;*
Allison vs. Halfacre, 11 Iowa 450;
Clarkson vs. Buchanan, 53 Mo. 563;
Gaston vs. Stott, 5 Ore. 48;
Keller vs. Brickey, 78 Ill. 133.

Much importance, of course, was attached to the use of the words "are hereby granted" in the Act of 1850. With respect thereto the court said:

"The language of the first section of the Act indicates a grant in praesenti to each State of lands within its limits of the character described. *Its words 'shall be and are*

hereby granted' import an immediate transfer of interest, not a promise of a transfer in the future." (P. 496, 121 U. S.)

* * *

"The grants by the United States of land to aid in the construction of railroads, in relation to which we have had many cases before us, are in many particulars analogous to the grant by the Swamp-Land Act. They are usually of a specified number of sections of land on each side of the proposed route of the road, with a reservation of certain sales or other disposition made before such road becomes definitely fixed. *The usual words of grant in such cases are similar to those in the Swamp-Land Act—'there is hereby granted.' Though it is impossible to locate the land granted until the route is fixed, yet when that is fixed, the grant takes effect as of the date of the Act.* This would be equally the case were the mode prescribed to fix the boundaries more complicated and difficult. Thus in the case of Leavenworth, L. & G. R. R. Co. v. United States, 92 U. S. 733, the language was, 'There be and is hereby granted to the State of Kansas,' and in reference to it the court said: 'It creates an immediate interest and does not indicate a purpose to give in future. 'There be and is hereby granted' are words of absolute donation and import a grant in praesenti. This court has held that they can have no other meaning; and the land department, on this interpretation of them, has uniformly administered every previous similar grant. * * * They vest a present title in the State of Kansas, though a survey of the lands and a location of the lands are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them.' See, also, R. R. Co. v. Baldwin, 103 U. S. 426; Missouri, K. & T. R. Co. v. Kansas Pac. R. Co. 97 U. S. 491; Schulenberg v. Harriman, 21 Wall. 44, 60; Rutherford v. Greene's Heirs, 2 Wheat. 196." (P. 499, 121 U. S.)

For the later decisions to the same effect, see:

St. Paul Ry. Co. vs. N. P. Ry. Co., 139 U. S. 1, 11 Sup. Ct. 389, 35 L. ed. 77;
Bardon vs. N. P. Ry. Co., 145 U. S. 535, 12 Sup. Ct. 856, 36 L. ed. 806;
Whitney vs. Taylor, 158 U. S. 85, 15 Sup. Ct. 796, 39 L. ed. 906;
Northern Lbr. Co. vs. O'Brien, 204 U. S. 190, 27 Sup. Ct. 249, 51 L. ed 438.

In the case of Tubbs vs. Wilhoit, 138 U. S. 134, 11 Sup. Ct. 279, 34 L. ed. 887, the court, referring to the Roseberry case, said:

> "Soon after the passage of the Act the question arose in each State as to the time the grant took effect—whether at the date of the Act, or on the issue of the patent to the State upon the request of its governor after the list and plats of the lands had been made out by the Secretary of the Interior and transmitted to him. After much consideration by the officers of the department of the government under whose supervision the Act was to be carried out, and by the courts of the several States in which such lands existed, *it was held that the words 'are hereby granted' in the Act imported a present grant, and not a promise of one in the future; and that the title to the lands, therefore, passed to the State at once, their identification to be made by the action of the Secretary of the Interior, but when identified the title to relate back to the date of the Act.*
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> "In the recent case of Wright v. Roseberry, 121 U. S. 488, the rulings of the officers of the Land Department, and of the courts of the States in which swamp and overflowed lands existed, by which the conclusion mentioned was reached, are stated with much fulness, and it is unnecessary to repeat what is there said. *It is sufficient to observe that the construction thus given to the Act is now the accepted law of the country.*" (P. 136, 138 U. S.)

This construction has since been accepted as the law, as evidenced by decisions of many state courts and by decisions of the inferior federal courts. The cases are collected in Rose's Notes on United States Reports, volume 13, page 983. These cases show that the swamp land act has been, since the rendition of the decision in the Roseberry case, universally interpreted in accordance with the principles of law therein laid down. That the act has been administered in accordance with these same principles is evidenced by a long line of land decisions:

State of Oregon, 3 L. D. 474;
State of California, 1 L. D. 312;
State of California, 1 L. D. 320;
Instructions, 2 L. D. 471, 472;
Cushing v. Michigan, 4 L. D. 415;
State of Louisiana, 5 L. D. 514;
Marquam v. Suomela, 21 L. D. 279;
State of Minnesota, 22 L. D. 388;
State of Oregon, 23 L. D. 460;
State of Minnesota, 27 L. D. 418;
State of Minnesota, 32 L. D. 65;
State of Minnesota, 32 L. D., 328;
Oregon v. Frakes, 33 L. D. 101;
State of Minnesota, 37 L. D. 397;
Mississippi v. Buford, 48 L. D. 421;
(1921) and (1922), 48 L. D. 427.

And as we read later decisions of this court, we have no hesitancy whatever in advancing the view that this court has consistently adhered to the fundamental rule of the Roseberry case, namely, that the grant was one in praesenti and that upon perfection of title such title relates back to the date of the grant. With respect to these later decisions, (Mich. Land & Lbr. Co. v. Rust, 168 U. S. 589, 18 Sup. Ct. 208, 42 L. ed. 591; Brown v. Hitchcock, 173 U. S. 473, 19 Sup. Ct. 485, 43 L. ed. 772; Niles v. Cedar Point Club, 175 U. S. 300, 20 Sup. Ct. 124, 44

L. ed. 171; Little v. Williams, 231 U. S. 335, 34 Sup. Ct. 68, 58 L. ed. 256; Chapman & Dewey Lbr. Co. v. St. Francis Levee Dist., 232 U. S. 186, 34 Sup. Ct. 297, 58 L. ed. 564; Lee Wilson & Co. v. U. S., 245 U. S. 24, 38 Sup. Ct. 21, 62 L. ed. 128), plaintiff argues to the contrary. Let us briefly review these cases.

1. *Michigan Land & Lumber Co. vs. Rust.*

In this case the court said:

> "The Act of 1850 made a grant in praesenti; in other words, the title then passed to all lands which at that date were swamp lands, and the only matters thereafter to be considered were those of identification." (P. 591, 168 U. S.)

Following this statement of the law, the Roseberry case is cited.

In this case it appears that the lands in controversy, situated in the Ionia Land District in the State of Michigan, had been, prior to 1850, included in surveys made by the United States Land Office. These surveys showed them to be swamp. The Michigan legislature, upon information before it that surveys in this district were in many particulars erroneous, as early as 1842 passed a resolution, directing that the President of the United States be advised of the situation and requested to cause steps to be taken to correct mistakes and errors by resurveys. This was done, the work starting in 1845 and being completed in 1857. The resurveys showed the lands in question not to be swamp.

It appears that in 1854 a list of swamp lands in the Ionia District was made up, approved and certified to the State of Michigan, and that this list included the lands in dispute. The issuance of patents to these lands was withheld, however, the explanation made to the state being that, due to mistakes and errors, the lands within the Ionia District were being resurveyed. Upon the completion of these surveys and the showing made thereby

to the effect that much of the land in the district which had previously shown up as swamp was not swamp, lists conforming to these new surveys were made up, approved and certified by the Secretary of the Interior and forwarded to the Governor of Michigan. The receipt of such lists was acknowledged and a request made for patents to the lands described therein, and patents were issued and accepted covering such lands. These new lists did not contain the lands in controversy and as a consequence they were not patented to the state.

After all this had taken place, and in 1870, the lands in question were sold by the United States at auction, after public advertisement, and patents were issued to such lands. It is through these patents that defendants claimed title.

The contention of plaintiff was that the lands were swamp and granted to the State of Michigan by the Act of 1850; that they were included in a list of such lands in the Ionia Land District, approved by the Secretary of the Interior and forwarded to the Governor of the state on June 13th, 1854; that the Act of March 3, 1857 (11 Stat. 251) confirmed the action of the Secretary of the Interior and thereby passed the title to the state by which it was, on October 14th, 1887, conveyed to plaintiff's grantor.

The question before the court was whether the Secretary of the Interior had the power, after submitting a list of swamp lands to the Governor, to correct such list before the issuance of patents to the state. The court held that the Secretary not only had that power but that it was his duty under the Act to make such corrections; and for the obvious reason that it was for him to see that the state got only what the grant of 1850 gave to it, namely, swamp lands.

But it may be said that the plaintiffs advanced the claim that the lands were as a matter of fact swamp, and as a consequence that the state derived title thereto under the Act of 1850 and as of its date. It may be asked, if the Act of 1850 made a

grant in praesenti to swamp lands, why were not the plaintiffs permitted to show that the lands involved were swamp in character? The court sent the Roseberry case back for a retrial so that the defendant might show the lands claimed were swamp. The court in this case, as in the Roseberry case, held the grant to be in praesenti, passing the title to the state subject to the identification thereof as swamp. In this case the court pointed out that it was the duty of the Secretary of the Interior to designate what lands were swamp and what were not; that he did this with respect to the Ionia Land District with the result that the lands in dispute were not included in the list of swamp lands of that district; that the list so made out was transmitted to the Governor of the state and accepted by him. The court said the identification of swamp lands for the district so made out and accepted was final and conclusive and not open to attack. Neither the state, nor one claiming under it, (the plaintiff in that case) could be heard to question it. In the Roseberry case, the court pointed out that identification of swamp lands was necessary before the state could get a perfect title. Attention was called to the fact that identification had been made in compliance with the law applicable to the State of California, the Act of July 23, 1866. The identification so made was held to be conclusive as to the state; but not as to defendants, for the reason that they were claiming under patents issued by the United States under the preemption laws prior to the date of the identification of the lands as swamp. As a consequence, the case went back for proof as to the character of the lands.

The foregoing analysis of the cases discloses that they are not in conflict. On the contrary, they are in absolute harmony. In both cases it was held that the grant of 1850 was a present one; and that identification was necessary to render the state's title perfect. The only thing the Michigan Land & Lumber Company case did that was not done in the Roseberry case was to hold that, until patent issues, the official charged with identifying

swamp lands has the right to correct mistakes and errors in lists thereof. This was the announcement of new law, but not a modification of that laid down in the Roseberry case.

2. *Brown vs. Hitchcock.*

No particular attention need be given to the Brown v. Hitchcock case, for the reason that the question there presented was the same as the one which had been before the court in the Michigan Land & Lumber Company case. An attempt was made to have the court modify the opinion in the Michigan Land & Lumber Company case. This the court declined to do. It said:

> "Indeed, it may be observed that the argument in behalf of appellant was avowedly made to secure a modification of that opinion. We might well have disposed of this case by a simple reference to that decision; but in view of the earnest challenge by counsel for appellant of the views therein expressed, we have re-examined the question in the light of that argument and the authorities cited. And after such re-examination we see no reason to change, but on the contrary, we reaffirm the decision in Michigan Land & Lumber Co. v. Rust." (P. 477, 173 U. S.)

3. *Chapman & Dewey Lumber Co. v. St. Francis Levee District.*

In this case a township in one of the counties of Arkansas had been surveyed in 1840 and 1841. The lands in controversy and other lands situated within this township were excluded from the survey. They were meandered as a lake and shown to be such on the plat. The township was approximately six miles square and the plat bore an inscription to the effect that the total of the surveyed area was 14,329.97 acres, so that the unsurveyed areas represented as water contained approximately 8,000 acres.

After the passage of the Swamp Land Act of 1850, the state requested that the township be listed as swamp and patented

to it. It was listed in 1853 and patent issued in 1858. The state in requesting the listing described the township as containing 14,329.97 acres, the total of the surveyed area as indicated upon the plat. The Secretary of the Interior in making the list deducted from this total 514.30 acres which it appears had passed to the state under a school land grant. The patent embraced lands in several townships, the portion of the description here material being as follows:

> "Township 12 North of Range 7 East. The whole of the Township (except Section Sixteen), containing thirteen thousand, eight hundred and fifteen and sixty-seven hundredths of an acre—according to the official plats of survey of said lands returned to the General Land Office by the Surveyor General."

The levee district claimed title to the land by reason of a conveyance to it by the state of "all the lands of the state" within a certain district, including this township. The right of the state to convey was based on the swamp land act. The defendants opposed this claim on several grounds, one of which was that the lands had not passed to the state and that they were still the property of the United States.

It is apparent that this single question was before the court: "Did the lands in question pass to the state under the patent conveying to it the lands in township 12?"

The answer to the question turned on the intention, as is shown by the following excerpt from the opinion, written by Mr. Justice Van Devanter:

> "If the patent conveyed these lands to the State we are not concerned with their subsequent disposal, for that is a question of local law. But did the patent include them? This, of course, is a Federal question. In answering it in the affirmative, the state courts regarded the words 'Sunk Lands,' shown upon the plat, as meaning

that the unsurveyed area to which they were applied was land and not water, and also regarded the words 'The whole of the Township (except Section sixteen),' as used in the patent, as embracing all that was within the exterior lines of the township, except Section 16, whether surveyed or unsurveyed and even although meandered and excluded from the survey. We are unable to accede to this view of either the plat or the patent.

"Had the plat shown that all the lands were surveyed, it doubtless is true that the words 'Sunk Lands' would not have indicated the presence of a body of water, but would have been taken in much the same way as would such words as 'valley', 'broken hills' or 'level plateau'. But the plat showed, as did also the field notes, that the area to which the words were applied was not included in the survey, but was excluded therefrom and meandered as a body of water, and also that the adjoining sections and subdivisions were surveyed as fractional, as is usual with lands abutting on a lake or similar body of water. Thus, what appeared upon the plat had the same meaning as if this area had been called 'Sunk Lands Lake'. And that the officers of the State and of the United States so understood is shown by the fact that in the proceedings preliminary to the issuance of the patent, as also in the patent, this and similar areas were excluded in specifying the amount of land in the township.

"Of course, the words in the patent, 'The whole of the township (except Section sixteen)' are comprehensive, but they are only one element in the description and must be read in the light of the others. The explanatory words 'according to the official plats of survey of said lands returned to the General Land Office by the Surveyor General' constitute another elemnet, and a very important one, for it is a familiar rule that where lands are patented according to such a plat, the notes, lines, landmarks and other particulars appearing thereon become as much a part of the patent and are as much to be considered in determining what it is intended to include as if they were set forth in the patent. Cragin v. Powell, 128 U. S. 691,

696; Jefferis v. East Omaha Land Co., 134 U. S. 178, 194. The specification of the acreage is still another element, and, while of less influence than either of the others, it is yet an aid in ascertaining what was intended, for a purpose to convey upwards of 22,000 acres is hardly consistent with a specification of 13,815.67 acres. Ainsa v. United States, 161 U. S. 208, 229; Security Land Co. v. Burns, 193 U. S. 167, 180; 3 Washburn on Real Property, 5th ed. 427. Giving to each of these elements its appropriate influence, and bearing in mind that the terms of description are all such as are usually employed in designating surveyed lands, we are of opinion that the purpose was to patent the whole of the lands surveyed, except fractional section 16, and not the areas meandered and returned, as shown upon the plat, as bodies of water. That it is now found, as shown by the decisions below, that these areas ought not to have been so meandered and returned, but should have been surveyed and returned as land, does not detract from the effect which must be given to the plat in determining what was intended to pass under the patent. Niles v. Cedar Point Club, 175 U. S. 300, 306; Hardin v. Shedd, 190 U. S. 508, 520." (P. 196, 232 U. S.)

There is nothing in this language showing a departure from the rule of the Roseberry case. The holding is simply one that a patent describing a certain township surveyed prior to the issuance thereof does not include lands left unsurveyed through error. The scope of the patent, rather than the scope of the swamp land act, was determined.

Nor can the following remarks of the court be construed as modifying the doctrine of the Roseberry case:

> "But it is said on behalf of the levee district that, even though the lands were not included in the patent, they passed to the State under the Swamp-Land Act independently of any patent, and passed thence to the district under the state act of 1893, The contention is not ten-

> able. *The lands were never listed as swamp lands and their listing does not appear to have been even requested, doubtless because they were not surveyed. Assuming that in fact they were swamp lands, the State's title under the Swamp-Land Act was at most inchoate and never was perfected. Not only so, but the State relinquished its inchoate title to the United States as part of a compromise* and settlement negotiated in 1895, and the relinquishment is binding upon the levee district as a subordinate agency of the State. Little v. Williams, 231 U. S. 335. See Carson v. St. Francis Levee District, 59 Arkansas, 513, 533-535." (P. 198, 232 U. S.)

Having in mind the fact that the lands in question had never been identified as required by the Act of 1850, how can these remarks be treated as in conflict with the rule of the Roseberry case? In that case it was held that the grant was one in praesenti, but that, to render the title of the state perfect, identification was necessary. If the lands in that case had never been surveyed, would not the court have held them a part of the public domain? In both cases the court recognized identification to be necessary and that the ultimate identification must be made in the manner provided and by the official authorized by law. It was recognized that it is not for the court to say what lands are and what lands are not swamp in character. In the Roseberry case, identification had been made. In the case under consideration this was not true. The lands, not having been identified as swamp as by law required, and not having been disposed of by the United States, were held to be public lands belonging to the United States.

4. *Niles vs. Cedar Point Club.*

In this case the court, following the case of Michigan Land & Lumber Company vs. Rust, said:

> "With respect to the contention that the character of this marsh, as it was found to have been, shows that it

should have passed to the state of Ohio under the swamp land act, *it is enough to say that the state of Ohio applied for it as such, that the application was denied, that this denial was made in* 1852, *that the land was never patented to the state and without such patent no fee ever passed,* Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, that subsequently the land department treated it as land subject to its control as public land of the United States, had it surveyed, sold and patented. *Whatever claims the state of Ohio may have cannot be litigated in this suit.* The legal title passed by the patent to the appellee's grantors, and that title is certainly good as against a stranger with no equities." (P. 308, 175 U. S.)

5. *Little vs. Williams.*

This was a suit to quiet title to about 1,200 acres of land in Mississippi County in the State of Arkansas. Plaintiff claimed title through (a) the Act of Congress of September 28, 1850 (9 Stat., 519) granting swamp and overflowed lands to the state; (b) an Act of the Legislature in 1893 (Laws Ark. 1893, page 172) granting to the St. Francis Levee District "all the lands of this state" lying within that district; and (c) a deed of March 11, 1903, from the Levee District to the plaintiff. After the trial, the chancery court of the county entered a decree dismissing the complaint on the merits. The lands in controversy had never been selected by the state or listed by the Secretary of the Interior as swamp or overflowed lands; nor were they ever patented to the state. In addition to this, as part of a compromise and settlement between the state and the United States, negotiated in 1895 and approved by the state legislature in 1897 and by Congress in 1898, the state accepted the lands theretofore patented, approved or confirmed to it under the Swamp Land Act as the full measure of lands due to it thereunder and relinquished to the United States all other claims or demands, adjusted or unadjusted, growing out of that act.

In view of the finding that the land in controversy was

never patented to the state, the question presented was whether the Swamp Land Act of 1850 in itself operated to invest the state with the title in any such sense "as to be of present avail to the plaintiff." The state court answered the question in the negative and was affirmed by the Supreme Court.

With respect to the nature of the grant, the court—Mr. Justice Van Devanter writing the opinion—said:

> "Although the terms of the 1st section of the act denote a present grant to the state of the 'swamp and overflowed lands, made unfit thereby for cultivation,' the 2d section lays upon the Secretary of the Interior the duty of identifying and listing the lands coming within the terms of the grant and of causing patents therefor to be issued to the state 'at the request of' its governor, and then declares: 'And on that patent the fee simple to said lands shall vest in the said state,' subject to the disposal of its legislature. It became necessary, in Rogers Locomotive Works v. Emigrant Co., 164 U. S. 559, to determine the meaning and effect of the act in the light of these provisions and of prior decisions, and it was there said (p. 570): *'While, therefore, as held in many cases, the act of 1850 was in praesenti, and gave an inchoate title, the lands needed to be identified as lands that passed under the act; which being done, and not before, the title became perfect as of the date of the granting act.'* And again (p. 574): 'It belonged to him (the Secretary of the Interior), primarily, to identify all lands that were to go to the state under the act of 1850. *When he made such identification, then, and not before, the state was entitled to a patent, and "on such patent" the fee-simple title vested in the state. The state's title was, at the outset, an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued.'* What was there said has since been regarded as the settled law upon the subject. Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592; Brown v. Hitchcock, 173 U. S. 473, 476; Niles v. Cedar Point Club, 175 U.

S. 300, 308; Ogden v. Buckley, 116 Iowa 352; Birch v. Gillis, 67 Mo. 102; Carr v. Moore, 119 Iowa, 152, 159." (P. 339, 231 U. S.)

6. *Lee Wilson Co. vs. United States*:

This case offers nothing new. It simply follows the previous decisions, Niles vs. Cedar Point Club and Chapman & Dewey Lumber Co. vs. St. Francis Levee District.

The foregoing review of the more recent cases with respect to the character of the swamp land grant shows that there has been no real change in the law as laid down in the Roseberry case. It has been consistently held that the grant was one in praesenti; and as consistently held that upon perfection of title the title relates back to the date of the grant.

Application of doctrine of relation to the swamp land grant specially considered.

In the Roseberry case it was said:

> "When identified, the title would become perfect as of the date of the act." (P. 500, 121 U. S.)

In Rogers Locomotive Machine Works vs. American Emigrant Co. 164 U. S. 559, 17 Sup. Ct. 188, 41 L. ed. 552, the court said:

> " While, therefore, as held in many cases, the act of 1850 was in praesenti, and gave an inchoate title, *the lands needed to be identified* as lands that passed under the act; *which being done, and not before, the title became perfect as of the date of the granting act.* Wright v. Roseberry, 121 U. S. 488, 494, et seq; Tubbs v. Wilhoit, 138 U. S. 134, 137; Chandler v. Calumet & Hecla Mining Co., 149 U. S. 79, 91." (P. 570, 164 U. S.)
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> * * *
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> "It belonged to him, primarily, to identify all lands that were to go to the State under the act of 1850. *When he made such identification, then and not before, the State was entitled to a patent, and 'on such patent' the*

fee-simple title vested in the State. The State's title was at the outset an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued." (P. 574, 164 U. S.)

In Little vs. Williams, supra, the court quoted with approval the above language from the case of Rogers Locomotive Machine Works vs. American Emigrant Company, and said:

"What was there said has since been regarded as the settled law upon the subject." (P. 340, 231 U. S.)

In the case of Work, Secretary of Interior, vs. Louisiana, the opinion in which, written by Mr. Justice Sanford, was handed down November 23, 1925, the court said:

"*The grants of swamp lands made by the Acts of* 1849 and *1850 were in praesenti and gave the states an inchoate title to such lands that became perfect, as of the dates of the acts, when they had been identified as required and the legal title had passed by the approval of the Secretary under the Act of 1849 or the issuing of a patent under the Act of 1850.* This has long been the settled construction of the Act of 1850. Rogers Locomotive Works vs. Emigrant Co., 164 U. S. 559, 570; Little vs. Williams, 231 U. S. 335, 339.

"*Each of these acts made a broad and unrestricted grant of the swamp lands.* Neither contained any exception or reservation of mineral lands."

* * *

"It is clear that, if there was no settled policy in reference to the reservation of mineral lands prior to the Acts of 1849 and 1850, there is no substantial ground for reading such a reservation into the broad and unrestricted grants of swamp and overflowed lands made to the states, *in praesenti*, by these acts, especially since such lands were not then generally known to contain valuable minerals, and when unfit for cultivation were commonly regarded as having value only after reclamation—the purpose for which both of these grants were made—the discovery of their oil and gas having been made at a much later date."

For other cases announcing and applying the doctrine of relation with respect to land grants, some of which involve the swamp land grant, see the following:

Chandler vs. Mining Co., 149 U. S. 79, 13 Sup. Ct. 798, 37 L. ed. 667;

McCormick vs. Hayes, 159 U. S. 346, 16 Sup. Ct. 37, 40 L. ed. 171;

Martin vs. Marks, 97 U. S. 345, 24 L. ed. 940;

French vs. Fyan, 93 U. S. 169, 23 L. ed. 812;

St. Paul R. R. Co. vs. N. P. Ry. Co., 139 U. S. 1, 11 Sup. Ct. 389, 35 L. ed. 77;

M. K. & T. R. R. Co. v. Kans. Pac. R. R. Co., 97 U. S. 491, 24 L. ed. 1095.

In the case at bar, swamp lands were granted to Minnesota by the Congressional Act of 1860. According to plaintiff, the President, with the concurrence of the Senate, thereafter transferred certain of these lands to the Indians—the lands here involved. This, it is claimed, is what was done by the Treaties of 1863, 1864 and 1867. After the making of the treaties, the lands were patented to the state as swamp. Of course, the preliminary steps with respect to identification and selection had been taken. Upon the issuance of patents, perfect title vested in Minnesota, and such title related back to the date of the grant, March 12, 1860, cutting out all claims based on the Treaties of 1863, 1864 and 1867. We see no escape from this conclusion in the light of the law as laid down in the decisions reviewed.

II.

The character of the grant with respect to its application to Minnesota was not changed by the Act of 1860.

1. *The Proviso.*

Plaintiff argues that, conceding the grant as originally made one in praesenti, the act extending the same to Minnesota so

modified its terms as to clearly indicate that neither the legal title nor any vested equitable right was to pass until the issuance of patents. It is said that a proviso contained in the Act of 1860 is necessarily inconsistent with the idea of a present grant; and that section 2 thereof shows that the grant, as extended to Minnesota, was one on condition and, the condition never having been complied with, the lands reverted back to the United States.

The proviso reads as follows:

> "Provided, that the grant hereby made shall not include any lands which are Government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act."

This emphasizes that the grant was a present one rather than showing to the contrary. The words "the grant hereby made" were made use of. It was the use of the words "hereby granted" in the Act of 1850 that was regarded so significant in the cases where the court was called upon to characterize the grant of 1850, and in which the court characterized the same as ne in praesenti.

The only purpose and effect of this proviso was to withdraw from the grant certain lands, namely, those lands which the Government may have reserved, sold or disposed of prior to the issuance of patent (confirmation of title) in pursuance of a law enacted prior to March 12, 1860. Upon the lands so withdrawn the act did not operate at all. Upon all other swamp lands it operated fully and at once. Out of the whole the withdrawal carved some lands, but no condition was thereby attached to the lands not carved out. The proviso, in effect, said to the states: "We must keep back from this present grant those lands which by a prior congressional act we have conveyed or hereafter must convey to another." This, we submit, is the only interpretation in accord with reason and common sense. It should prevail with-

out hesitation, it seems to us, over the strained construction of plaintiff.

2. *Section 2.—Its Purpose and Effect.*

Section 2 reads as follows:

> "Sec. 2. And be it further enacted, that the selection to be made from lands already surveyed in each of the States including Minnesota and Oregon, under the authority of the act aforesaid, and of the act to aid the State of Louisiana in draining the swamp lands therein, approved March second, one thousand eight hundred and forty-nine, shall be made within two years from the adjournment of the legislature of each State at its next session after the date of this act; and, as to all lands hereafter to be surveyed, within two years from such adjournment, at the next session, after notice by the Secretary of the Interior to the governor of the State, that the surveys have been completed and confirmed."

The administration of the Act of 1850 prior to the enactment of the Act of 1860 had not been to the satisfaction of the states. This was due to the delay of the Secretary of the Interior in identifying the lands and furnishing to the states the required lists. The legislatures of the states in which such lands existed very generally themselves undertook to identify the lands, and to dispose of them, and for that purpose passed legislation for their survey and sale and the issuance of patents to purchasers. Much inconvenience, and in many instances confusion of title, arose between those claiming under the state and those claiming directly from the United States. To straighten out matters Congress passed an act on March 2, 1855 (10 Stat. 634) and another on March 3, 1857 (11 Stat. 251). Prior to these acts doubt existed as to the right of the states to do as heretofore outlined. These enactments recognized this right. It was said to exist in the Roseberry case. Selections of land made by a state, as to whether swamp in character, were, however, subject

to review by the Secretary of the Interior. His determination in all cases was necessary and when made was conclusive, except under the peculiar procedure prevailing in California. The Act of 1860 recognized this right, but Congress evidently felt that states making their own selections should proceed promptly. It therefore provided in effect that where a state elects to do its own selecting, it must do so with respect to surveys made prior to the date of the act within two years after the adjournment of its legislative session following notice of the approval of the surveys. The recognition of this right and the imposition of a restriction on the exercise thereof cannot be construed as changing the character of the grant. The grant continued the same as before. The section was simply a declaration to the states choosing to exercise this right that they must do so within a specified time. Does this mean that a failure to select within the time designated works a forfeiture of swamp lands? Not at all. Such a failure would amount to a waiver of the right to select in advance of action by the Secretary of the Interior; in other words, an election to await the pleasure of the Secretary in the premises.

The court seems to have been of the same view in the Roseberry case, where this was said:

> "The Act of Congress of March 12, 1860, 12 Stat. 3, chap. 5, extending the provisions of the Swamp-Land Act to Minnesota and Oregon, *recognized in its second section their right and that of other States to make selections of the swamp lands, or rather to provide for their identification, without waiting for the action of the Secretary of the Interior.* That section provides that the selection to be made from lands already surveyed in each of the States should be made within two years from the adjournment of the Legislature of the State at its next session after the date of the Act, and, as to all lands thereafter to be surveyed, within two years from such adjournment at the next session, after notice by the Secretary of the Interior to the Governor of the State that the surveys

have been completed and confirmed." (P. 510, 121 U. S.)

3. *Practical Construction.*

That Section 2 has always been construed as giving the states the option of making their own selections, or leaving it to the pleasure of the Secretary of the Interior, will be shown by what will be said under subdivision III of this brief.

III.

The act as extended to Minnesota was administered, and with particular reference to the lands in question, in strict accord with the construction of many years' standing placed thereon by those charged with the duty of administering the same.

1. *Identification and Selection Under the Act of 1850.*

The Act of 1850 was construed by the Secretary of the Interior at a very early date as giving to the states the option of making selections themselves or awaiting action by the Secretary of the Interior. This is shown by a statement prefacing a pamphlet, setting forth swamp land laws, regulations and decisions thereunder, published by the Department of the Interior, General Land Office, on March 17, 1896. The statement reads as follows:

"Department of the Interior,
General Land Office,
Washington, D. C., March 17, 1896.

"As soon as practicable after the passage of the swamp land grant of September 28, 1850, viz. on the 21st November, 1850, the commissioner transmitted to the governors of the respective States to which the grant applied copies of office circular setting forth the provisions of said act, giving instructions thereunder, and allowing the

States to elect which of two methods they would adopt for the purpose of designating the swamp lands, viz:

"1. The field notes of Government survey could be taken as the basis for selections, and all lands shown by them to be swamp or overflowed, within the meaning of the act, which were otherwise vacant and unappropriated September 28, 1850, would pass to the States.

"2. The States could select the lands by their own agents and report the same to the United States surveyor general with proof as to the character of the same.

"The following States elected to make the field notes of survey the basis for determining what lands passed to them under the grant, viz.: Louisiana, Michigan and Wisconsin. Later the State of Minnesota adopted this method of settlement.

"The authorities of the following States elected to make their selections by their own agents and present proof that the lands selected were of the character contemplated by the swamp grant, viz: Alabama, Arkansas, Florida, Illinois, Indiana, Iowa, Mississippi, Missouri and Ohio. Later Oregon adopted this method.

"The States of Alabama, Arkansas, Indiana, Mississippi and Ohio adopted the second method at the beginning, but they changed to the first method, i. e., to the field notes of survey, as a basis of settlement, in recent years.

"The authorities of California did not adopt either method, and the passage of the act of July 23, 1866, rendered such action on their part unnecessary.

"In Louisiana the selections under the grant of March 2, 1849, forming the bulk of the selections in said State, are made in accordance with the terms of said act by deputy surveyors, under the direction of the United States surveyor general, at the expense of the State.

"All lands properly selected and reported to this office as swamp are placed of record in books especially prepared for that purpose. Thereafter the selections are compared with the other records of the office, and lists of such lands as are shown to be swamp or overflowed,

within the meaning of the act, and that are otherwise free from conflict are made out by this office and submitted to the Secretary of the Interior with the recommendation that the same be approved.

"When the lists have been approved by the Secretary and returned to this office duplicate copies of the same are made out, one of which is transmitted to the governor of the State, with the statement that on receipt of his request patent will issue to the State for the lands. The other list is transmitted to the register and receiver of the land office in which the lands are situated, and they are requested to examine the same with the records of their office and report any conflicts found.

"Upon receipt of reply to the letters of this office as above, patents issue to the State for all lands embraced in said lists so far as they are free from conflict.

"Under the provisions of the act of March 2, 1849, granting swamp lands to the State of Louisiana, a certified copy of the list approved by the Secretary of the Interior, transmitted to the governor, has the force and effect of a patent.

"The 'list' referred to in section 2 of the act of September 28, 1850, is held to be the copy of the list approved by the Secretary of the Interior sent to the governor, upon which his request for patent is based."

2. *Identification and Selection Under the Act of 1860—Minnesota elected to abide by the field notes of the government surveys.*

The act as extended to Minnesota was construed in the same way almost immediately following the passage of the Act of 1860.

The matter of identifying and selecting the swamp lands granted to Minnesota under the Act of 1860 was taken up by the Comissioner of the General Land Office, acting under direction of the Secretary of the Interior, on May 21, 1860, in a communi-

cation addressed to the Governor of the State of Minnesota, reading in part as folows:

> "Preliminary to the adjustment of the business with the several States affected by the general grant two propositions were submitted designed to obtain a plan or basis which should be adhered to, and be conclusive in the settlement of the great interests involved:
>
> "1st. Whether the States would be willing to abide by the field notes of the surveys as designating the lands, or
>
> "2nd. Whether in the event of their non-acceptance of these notes as the basis the States should furnish evidence that any lands are of the character embraced by the grant.
>
> "The privilege of accepting one or the other of these propositions having been accorded to those states the same is extended to Minnesota.
>
> "Having experience in the adjustment of the grant with those states it is respectfully suggested by this office that by the adoption of the first proposition the State will receive all the lands to which she is justly entitled, as the field notes of the survey are very full in characterizing or giving description to the soil; and an important reason for doing so is that she will incur no expense in selecting or designating the lands." (32 L. D. 66).

On July 14, 1860, the Governor of Minnesota, in answer to this communication, submitted to said Commissioner the following inquiries:

> "If the State of Minnesota should elect to be governed in the selection of the lands allotted to her by the notes and plats of survey in the land office, would the general government also be concluded by this selection? Would a patent issued to the State preclude individuals thereafter taking any of these lands, upon showing that in fact they were not swamp lands?" (32 L. D. 66).

which were answered by him on October 8, 1860, in this way:

> "In reply to your letter of the 14th ulto., relative to the lands granted to the State of Minnesota as swamp, * * * I have to state, by whichever of the two modes submitted the lands may be selected, the general government reserves to itself the right to supervise the selecting, and holds them subject to its control until they shall have been approved and patented to the States." (32 L. D. 67).

As a result of this correspondence, the legislature of the State of Minnesota at its 1862 session enacted Chapter 62, General Laws of Minnesota for the year 1862, Section 48 of which provided that

> "The surveys on file in the Surveyor-General's office are hereby adopted as the basis upon which will be accepted the swamp lands granted to the State by the act of Congress of March 12th, 1860." (32 L. D. 67).

The Governor of the state soon thereafter in a letter to said Commissioner advised him of this action, and among other things said:

> "I have, therefore, to inform you, that the State of Minnesota will, nder the act of Congress of March 12, 1860, * * * abide by the field notes of the Government surveys, designating the lands, etc., and I have, therefore, to ask that you will direct immediate steps to be taken to confirm in Minnesota title to these lands." (32 L. D. 67).

3. *Failure of Minnesota to select in accordance with section 2 of the Act of 1860 held not to result in forfeiture.*

Whether the state lost the swamp lands by reason of its failure to identify the same in accordance with the provisions of section 2 was before the Secretary of the Interior for consideration in 1877. On December 4th of that year he addressed

a communication to the Commissioner of the General Land Office, in which he said:

> "The action of the legislature of Minnesota, approved by the chief executive of the state, was, so far as the power existed in the grantee, a selection by her of the lands granted. All that remained to be done in the premises, where lands had been surveyed prior to March 12, 1860, was merely the clerical duty of preparing the lists of lands thus enuring to the state, and the issuing of a patent for the same * * * duties that in the ordinary course of the administration of the laws pertaining to our land system would take much time * * *.
>
> "This Department invited the state to adopt a certain method of ascertaining what lands enure to her under a grant. The state having complied with the suggestion, exhausted her power to act in the premises, and the Department is barred from asserting that, because of its laches and delay in identifying the lands, the selection has not been made within the prescribed time. The government is not in a position to raise that question.
>
> * * *
>
> "The principles announced in this letter should govern in the adjustment of the swamp grant to the State of Minnesota."
>
> 2 Copp. 1081.

The question was again raised in 1895 and the answer thereto is found in Marquam vs. Suomela, 21 L. D. 279. We quote from this decision as follows:

> "The remaining question is, whether or not the state forfeited its right to the land by its failure to select the same according to the terms of the 2nd section of the act making the grant (12 Stat. 3). That section provides that:
>
> The selection to be made from lands already surveyed in each of the states including Minnesota and

Oregon, shall be made within two years from the adjournment of the legislature of each state at its next session after the date of this act; and, as to all lands hereafter to be surveyed, within two years from such adjournment, at the next session after notice by the Secretary of the Interior to the Governor of the state that the surveys have been completed and confirmed.

"The land herein was surveyed and the survey was approved December 30, 1856, and the selection was not made until September 21, 1871.

"It is manifest, therefore, that the legislative mandate was not observed in this selection.

"The case of Pengra v. Munz (29 Fed. Reporter 830), cited by counsel, holds that the grant of 1860 (supra) to Oregon and Minnesota was made upon the condition precedent that the selection of lands thereunder is made within the time limited therein, and that if the selection is not made within the time prescribed, the grants revert to the United States.

"I cannot concur in this view of the law.

"The Act of September 28, 1850, known as the swamp land grant, was made applicable to the state of Oregon by the Act of 1860 (supra). It granted 'the whole of those swamp and overflowed lands which may be or are found unfit for cultivation.' Under that designation and description, the act read 'shall be and the same are hereby granted.' It was therefore a present grant, as has been repeatedly held by the courts. Railroad Company v. Fremont Company, 9 Wall. 89; Martin v. Marks, 7 Otto, 345.

* * *

"The land being of the character contemplated in the Swamp Land Act, passed to the state, notwithstanding the failure of the state to make its selections within the time prescribed in the grant. (See letter of Secretary Schurz, June 4, 1880, 7 Copp. p. 53; also Crowley vs. State of Oregon, Idem p. 28.)" Marquam v. Suomela, 21 L. D. 279 (1895).

The Marquam case related to Oregon swamp lands; and it

should be noted that Oregon had elected to make its own selections and not be bound by the Government field notes.

In 1906, the Attorney General of the United States ruled that the state did not forfeit the grant by failing to select in accordance with section 2. (25 Opin. 626).

The question was last considreed in Rutledge vs. State of Minnesota, 37 L. D. 397, rendered on January 15, 1909, where this was said:

> "The effect of the proviso respecting the making of selections within two years after survey, was most carefully considered by this Department during the year 1906, upon a question presented by the Secretary of Agriculture, and, in view of the importance of the matter, the question was referred to the Attorney-General for his opinion. On June 15, 1906, the Attorney-General advised this Department that the proviso in question was not a condition or limitation of the grant, but merely a direction to the Secretary of the Interior. (See 25 Opinions Attorney-General, 626.)
>
> "It will be observed that this opinion supports the views expressed by Secretary Schurz in a communication addressed to the Commissioner of the General Land Office on December 4, 1877 (2 Copp's Public Land Laws, 1081)."

4. *History of Administration in Minnesota.*

Until 1886 the practice was to determine the state's title to lands in accordance with the disclosures made by the field notes of the government surveys. Following the decision in the case of Lachance v. The State of Minnesota (4 L. D. 479), handed down in 1886, and until 1903, a settler, an applicant under the public land laws, or the United States, was permitted to question the returns of the United States Surveyor as to the character of any given piece of land. There was no regulation promulgated or procedure adopted whereby the state could question such

returns; and the state throughout this period was held bound by the field notes, notwithstanding they might in a given case be erroneous to the state's loss. Under this practice the Secretary of the Interior adopted the plan of identifying swamp lands by examinations by agents in the field and by contests and hearings before the land department. The state at all times protested against this scheme of adjustment, and insisted that its grant should be adjudicated upon the field notes alone. In 1903 the Secretary of the Interior, considering the practice to be cumbersome, expensive, slow, litigious and generally unsatisfactory discarded it, except as to certain pending controversies, and returned to the original practice, namely, that of administering the grant on the basis of the field notes of the government surveys. Notwithstanding this, the practice was not thereafter strictly adhered to. With respect to the lands here involved the field notes were not in all cases followed. A re-examination of some of the lands was made in 1910 under the direction of the Secretary of the Interior, and patents to some thereof were issued based on the report of the Secretary's field agents. Settlers on some of the lands not so patented were permittd to question the accuracy, not only of the field notes of the original surveys, but also of the re-examination to the effect that the lands were swamp in character. This resulted in numerous contests before the Land Department and the Secretary of the Interior. The state asserted its claim in these contests by offering proof in support of the disclosures made by the field notes and re-examination. The ultimate decisions in these contests with respect to the character of the lands were held by the Secretary to be determinative of the state's right to such lands. State of Minnesota, 32 L. D. 65.

As heretofore shown, Minnesota was given the privilege of having its swamp lands identified and selected in one of two ways. It chose the plan recommended and urged upon it by the Secretary of the Interior. It has been held to this plan

throughout the administration of the law down to the present time. From 1886 to 1903, the period during which a modified scheme for identification and selection was put into operation, both the Secretary of the Interior and the state proceeded on the supposition that Minnesota was bound by the field notes. Minnesota made its choice and by reason of the character thereof and the procedure followed by the Secretary of the Interior as above outlined, there has been nothing for Minnesota to do in the matter of selecting swamp lands. After each survey there remained only the matter of making out lists of lands inuring to the state with the resultant issuance of patents. This the Secretary has all along assumed to be within the line of his duty, and correctly so. The lists would first be made up by the Commissioner of the General Land Office, and by him submitted to the Secretary of the Interior, who, if approved by him, would return them to the Comissioner, who would make duplicate copies thereof, and transmit one to the Auditor of the state. The lists would then be examined by said Auditor and differences, if any, between the state and the Department of the Interior adjusted, after which a request would be made for patent and patent would thereupon issue. Under this procedure, followed by reason of Minnesota's election to abide by the field notes, defendant has never had anything to do with the matter of selecting and listing swamp lands; this has always been considered by both federal and state officials as within the exclusive jurisdiction of the Secretary of the Interior. The state has always, and with particular reference to the lands involved in this suit, acted with due diligence in demanding the issuance of patents following the submission to her of swamp land lists as aforesaid. (R. p. 65.)

5. *Land Decisions.*

That Section 2 did not operate to change the character of the grant from one in praesenti to one on condition has always been the opinion of the Interior Department is shown, in addition to the practice followed in administering the grant, by many

land decisions. 7 Copp's L. O. 28, 23 L. D. 460, 27 L. D. 418, 32 L. D. 65, 32 L. D. 328, 33 L. D. 101 and 37 L. D. 397. Portions of these decisions are set out in an appendix attached to this brief.

IV.

The construction placed on the grant by the Interior Department is in accord with the true intent and meaning of the act; if doubt exists as to this, the grant having been consistently administered in accordance therewith, such construction should be accepted by the court.

The foregoing practice and land decisions show clearly that the Interior Department has at all times administered the grant as to Minnesota on the basis that Section 2 did not impose an obligation upon Minnesota to make selections in accordance therewith; but that such section simply gave to Minnesota the option of making selections if it should care to do so. Minnesota elected to leave the matter of selecting the lands to the Secretary of the Interior; in other words, to abide by the field notes of the Government surveys. And the act has been consistently administered in acordance with this interpretation. We contend that this interpretation is in accord with the purpose and intent of Section 2; this for reasons already stated. If, however, there should be doubt as to this, we insist that the situation is one for the application of the rule that a construction placed on a law by the officer or department charged with the duty of administering it, followed for many years, will be accepted by the courts.

1. *Reasons for Application of Doctrine of Practical Construction.*

If the construction placed on the act and followed in the administration of the grant made thereby be now declared wrong, the transfer of thousands of acres of land in addition to those here involved will necessarily be in jeopardy. In fact, a suit is now pending in this court commenced by the United States

against Minnesota at about the time of the institution of the suit at bar, in which the United States seeks to recover the value of 475,049.92 acres of land claimed to have been illegally patented to the state. The lands were patented pursuant to the construction given the law by the Secretary of the Interior as aforesaid, and the practice with respect to identifying and selecting the lands as outlined was followed.

The first of the patents to lands not here involved were issued to the state approximately forty-nine years ago, and the last twenty-one years ago (see answer United States vs. Minnesota, No. 24, Original); and the first of the lands here involved some twenty-five years, and the last some thirteen years ago. The bulk of all the lands have been sold by Minnesota to private parties.

In the handling of the lands, involving appraisals, sale, collections of principal and interest and the keeping of records, the state has expended many thousands of dollars. The state has always interested itself in the settlement and improvement of the lands. Approximately $2,000,000 have been appropriated out of the general funds of the state, and approximately $49,000,000 have been spent by local subdivisions in reclaiming these lands through the construction of drainage projects. These projects have made hundreds of thousands of acres of swamp lands patented to the state fit for agricultural purposes, and they are now occupied, to a large extent, by persons who are operating them as farms.

The lands have been sold and are sold on long-time contracts, copy of one thereof being attached to and made a part of the answer. (R. p. 72.) Most of the contracts heretofore entered into have a number of years yet to run. Under these contracts, purchasers are required to make annual payments, and when full payment is made patent from the state issues. Proceeds have been and will continue to be placed in the trust funds of the state, pursuant to the provisions of section 2 of article 8 of the state constitution. (R. p. 69.)

These provisions require that such funds forever remain inviolate and undiminished, authority being given thereby to invest the same in certain specified securities. In the exercise of this authority, the legislature has directed that such sums be loaned on the bonds of the United States, the State of Minnesota, and all counties, towns, cities, villages and school districts thereof. This direction was first made many years ago, since which time the law has been in minor details modified. The law as it now stands is found in Session Laws of Minnesota for 1921, Chapter 516, a copy of which is attached to and made cise of this authority, the legislature has directed that such a part of the answer. (R. p. 73.) Proceeding under this legislative direction and laws enacted providing for the necessary machinery for loaning the funds, the bulk of such funds are kept invested in the bonds of municipalities, and principally in the bonds of school districts of the state for the erection and equipment of school houses. Of such funds, aggregating about $8,000,000, approximately $6,000,000 are now invested in the bonds of municipalities of the state. The state cannot turn over to plaintiff proceeds which have been and will be derived from the sale of swamp lands, but must, in case plaintiff is successful in this suit, call upon her property owners to furnish the requisite amount through the imposition upon them of levies of taxes for such purpose.

This court has not to date had occasion to consider the swamp land grant as extended to Minnesota. In the light of the foregoing, it is earnestly urged that such act should be construed in harmony with the interpretation given thereto by those charged with administering it. This, we say, should be done in case the court should entertain some doubt as to the soundness of such interpretation from a legal point of view. As heretofore stated, it is our position that the Interior Department has interpreted and administered the law in accordance with its true intent and meaning.

2. *Decisions on Practical Construction.*

The court, of course, has on numerous occasions accepted the construction placed on a law by those charged with administering it. The proposition has been stated in a variety of ways. We quote from a few decisions.

In United States v. Alabama Railway Co., 142 U. S. 615, 12 Sup. Ct. 306, 35 L. ed. 1134, it was said:

> "We think the contemporaneous construction thus given by the Executive Department of the Government, and continued for nine years through six different administrations of that Department, * * * *should be considered as decisive in this suit.* * * * It is a settled doctrine in this court that in case of ambiguity, the Judicial Department will lean in favor of a construction given to a statute by the Department charged with the execution of such statute, and if such construction be acted upon for a number of years, *will look with disfavor upon any sudden change,* whereby parties who have contracted with the Government upon the faith of such construction, may be prejudiced." (P. 621, 142 U. S.)

In United States v. Moore, 95 U. S. 760, 24 L. ed. 588, it was said:

> "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons." (P. 763, 95 U. S.)

In the case of Louisiana v. Garfield, 211 U. S. 70, 29 Sup. Ct. 31, 53 L. ed. 92, it was said:

> "As we understand, the continuous construction of the department has been to be contrary, and a great number of titles to a very large amount of land would be disturbed if we should accede to this argument. We see no reason for overthrowing the long continued understanding * * *." (P. 76, 211 U. S.)

In Logan v. Davis, 233 U. S. 613, 34 Sup. Ct. 685, 58 L. ed. 1121, it was said:

> "Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results. The situation, therefore, calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons." (P. 627, 233 U. S.)

In the case of California v. Deseret Water Company, 243 U. S. 415, 37 Sup. Ct. 394, 61 L. ed. 821, it was said:

> "It is true that the interpretation of the statute has not been uniform in the Department of the Interior, and it has been otherwise construed in at least one of the Federal Courts: * * * But the interpretation for which the State insists has been long given to it by the Interior Department * * * is still adhered to by the Land Department; that selections aggregating many thousands of acres have been made in reliance upon it, and that no doubt large expenditures of money have been made in good faith upon the selected lands. * * * In this situation we should be slow to disturb a ruling of the department of the government to which is committed the administration of the public lands." (P. 420, 243 U. S.)

Also, in United States v. Hammers, 221 U. S. 220, 31 Sup. Ct. 593, 55 L. ed. 710, it was said:

> "We do not find the act of 1891 as clear as the learned district court did, and must give to decisions of the Land Department the weight to which in such case, the court acknowledged, they are entitled." (P. 225, 221 U. S.)

"Conceding then, that the statute is ambiguous we must turn as a help to its meaning, indeed, in such case, as determining its meaning, to the practice of the officers whose duty it was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed have written them. At any rate, their practice, almost coincident with its enactment, and the rights which have been acquired under the practice, make it determinately persuasive." (P. 228, 221 U. S.)

It is stated in Orchard v. Alexander, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. ed. 737;

"So many rights, it may be presumed, have been created in reliance upon it that the courts will hesitate to decide that the construction thus practically asserted is erroneous, and so overthrow all the titles depending thereon." (P. 383, 157 U. S.)

In Heath v. Wallace, 138 U. S. 573, it was said:

"* * * the case would seem to be brought within the rule announced at a very early day in this court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons." (P. 582, 138 U. S.)

Also, in United States v. Chicago etc Ry Co., 218 U. S. 233, 31 Sup. Ct. 7, 54 L. ed. 1015, it was said:

"'Since then most, if not all, of the lands have been sold and conveyed to numerous purchasers of small tracts, who bought them in good faith and for value. Twenty-five years or more of quiet enjoyment of the land in question have now elapsed. No fraud or unfair practices in any stage of the proceedings leading up to the final patents are charged against the railway company or any

> persons acting for it. In such circumstances, it would, in our opinion, be inequitable and conductive of no good results to grant the relief sought by this bill.'" (P. 241, 218 U. S.)

In Schell v. Fauche, 138 U. S. 562, 11 Sup. Ct. 376, 34 L. ed. 1040, it was said:

> "In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally *held to be controlling.*" (P. 472, 138 U. S.)

In United States v. Burlington & Missouri R. R. Co., 98 U. S. 334, 25 L. ed. 198, (followed in Kansas Ry. Co. v. Atchison Ry. Co., 112 U. S. 414), it was said:

> "Such has been the uniform construction given to the acts by all departments of the government. Patents have been issued, bonds given, mortgages executed and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction, as if it had been declared by judicial decision. It cannot at this day be called in question." (P. 341, 98 U. S.)

And in United States v. State Bank, 6 Peters 29, 8 L. ed. 308, it was said:

> "It is not unimportant to state, that the construction which we have given to the terms of the act, is that which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment. * * * We think the practice was founded in the true exposition of the terms and intent of the act; but if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition." (P. 39, 6 Peters.)

See also:

United States v. Macdaniel, 7 Peters 1, 8 L. ed. 587;
Hastings & Dakota Ry. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. ed. 363;
Colorado Coal Co. v. United States, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. ed. 182;
United States v. Winona, St. Peter R. R. Co., 165 U. S. 463, 17 Sup. Ct. 996, 41 L. ed. 1079;
Edwards v. Darby, 12 Wheat. 206, 6 L. ed. 603.

V.

The Treaties of 1863, 1864 and 1867 did not operate to cancel the grant of 1860.

1. *Grant to Minnesota not Impaired by Treaties—No Title to Lands Passed to Indians Thereunder.*

The lands in question were ceded to the United States by the Treaty of 1855. Absolute title vested in the United States; the lands became public lands thereof. In 1860 Congress granted these lands to Minnesota. Following this, the Enlarged Leech Lake and White Earth Reservations were created. This was done by the Treaties of 1863, 1864 and 1867. Included within these reservations were the lands in question. The treaties did not operate to vest title to these lands in the Indians. The treaty-making power lacked authority to make disposition thereof. They, upon and after the passage of the Act of 1860, ceased to be public lands at the disposal of the United States.

In Wright vs. Roseberry, supra, the court said:

> "For the error in holding that the certificate of the comissioner was necessary to pass the title of the demanded premises to the State, the case must go back for a new trial, when the parties will be at liberty to show whether or not the lands in controversy were in fact swamp and overflowed on the day that the Swamp-Land Act of 1850 took effect. If they are proved to have been

such lands at that date, they were not afterwards subject to preemption by settlers. *They were not afterwards public lands at the disposal of the United States.* Parties settling upon such lands must be deemed to have done so with notice of the title of the State, and, after the segregation map was deposited with the Surveyor-General of the State, with notice also that they were actually segregated and claimed by the State as such lands." (P. 521, 121 U. S.)

In M. K. & T. Ry. Co. v. Roberts, 152 U. S. 114, 14 Sup. Ct. 496, 38 L. ed. 377, the court said:

"If the reservation named was intended as a grant of sections sixteen (16) and thirty-six (36) to the territory and to the states to be created out of them, or as a dedication of them for schools it could only apply to such lands as were public lands, for no other lands in our land system are subdivided into sections, nor could it embrace lands which had been set apart and reserved by statute or treaty with them for the use of the Indians, as was the case with the lands involved in this controversy, as we have already shown. As early as 1839 it was held in Wilcox v. Jackson, 38 U. S. 13 Pet. 498: *'That a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace or operate upon it, although no exception be made of it.'* The reservation referred to there was of land for military purposes; and in Leavenworth, L. & G. R. Co. vs. United States, 92 U. S. 733, it was said that this doctrine 'applies with more force to Indian than to military reservations. The latter,' the court observed, 'are the absolute property of the government. In the former other rights are vested. *Congress cannot be supposed to grant them in a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such purpose.'*" (P. 119, 152 U. S.)

Assuming for the sake of argument that the lands continued to be public lands, notwithstanding the Act of 1860, what authority did the President and the Senate have to pass title thereto to the Indians? We submit that they had none. Exclusive authority to dispose of public lands was in Congress. This was of necessity so by virtue of art. 4, § 3, cl. 2 of the Constitution. And this court has so held in many cases.

We quote from Utah Power & L. Co. vs. United States, 243 U. S. 389, 37 Sup. Ct. 387, 61 L. ed. 791, Mr. Justice Van Devanter speaking for the court, as follows:

> "Not only does the Constitution (art. 4, § 3, cl. 2) commit to Congress the power 'to dispose of and make all needful rules and regulations respecting' the lands of the United States, but the settled course of legislation, congressional and state, *and repeated decisions of this court, have gone upon the theory that the power of Congress is exclusive, and that only through its exercise in some form can rights in lands belonging to the United States be acquired.*" (P. 404, 243 U. S.)

In United States vs. Fitzgerald, 15 Pet. 421, 10 L. ed. 785, the court said:

> "No appropriation of public land can be made for any purpose but by authority of Congress."

But, as just pointed out, the lands in question ceased to be public lands at the disposal of the United States on the passage of the Act of 1860. Conceding that the President and Senate had authority to pass title to lands to the Indians, we contend that such authority was limited to public lands subject to disposal by the United States. The swamp lands having ceased to be such, the treaties did not and could not operate to transfer title thereto to the Indians. Congress had granted them to Minnesota. The treaty-making power surely could not step in and

revoke that grant. If there was power to do this, it was exclusively in Congress. So that the most the Indians obtained under the treaties was title to lands included within the boundaries of the reservations created thereby, save and excepting title to such thereof as were swamp in character.

2. Where parties claim lands under conflicting grants, the one claiming under grant first made has priority of right.

The situation before us seems to be similar to one where parties claim lands under conflicting grants. Viewed in this light, the rule so often announced and applied by this court is invocable, namely, that the one claiming under the grant first made has priority of right.

In the case of Mayor, etc. of New Orleans vs. United States, 10 Peters 662, 34 L. ed. 573, 600, it was said:

> "A grant has been frequently issued by the United States for land which had been previously granted, and the second grant has been held to be inoperative." (P. 730, 10 Pet.).

In the case of Wright vs. Roseberry, supra, we find this language:

> "It would be a most extraordinary doctrine if the holder of a conveyance of land from a State were precluded from establishing his title simply because the United States may have subsequently conveyed the land to another, and especially from showing that years before they had granted the property to the State, and thus were without title at the time of their subsequent conveyance. As this court said in New Orleans v. United States: 'It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive, and cannot be controverted; but if the thing granted was not in the

grantor, no right passed to the grantee. *A grant has been frequently issued by the United States for land which had been previously granted, and the second grant has been held to be inoperative'.*" (P. 520, 121 U. S.)

In M. K. & T. Ry. Co. vs. Kans. Pac. Ry. Co., 7 Otto 491, 97 L. ed. 1095, the court said:

> "But so far as the lands were identical with those covered by the previous grant to the plaintiff by the Acts of 1862 and 1864, *the title could not attach, as it had already passed from the Government.*" (P. 500, 7 Otto).

In the case of Lake Superior Ship Canal Railway & Iron Co. vs. Cunningham, 155 U. S. 354, 15 Sup. Ct. 103, 39 L. ed. 183, the court said:

> "*General terms in a subsequent grant are always held to not include lands embraced within the terms of the prior grant.*" (P. 373, 155 U. S.)

In Wilcox v. Jackson, 38 U. S. 13 Pet. 498, 10 L. ed. 264, the court said:

> "But we go further, and say that *whensoever a tract of land shall have once been legally appropriated to any purpose, that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it.*" (P. 513, 38 U. S.)

In Leavenworth, etc. Ry Co. vs. United States, 92 U. S. 733, 23 L. ed 634, the court said:

> "Such grants could not be otherwise construed; *for Congress cannot be supposed to have thereby intended to include lands previously appropriated to another purpose,*

> *unless there be an express declaration to that effect. A special exception of it was not necessary; because the policy* which dictated them *confined them to land which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts."* (P. 742, 92 U. S.).

In Shepley vs. Cowan, 91 U. S. 330, 23 L. ed. 424, it was said:

> "In all such cases *the first in time * * * is deemed to be the first in right;"* (P. 338, 91 U. S.)

In United States vs. N. P. Ry Co., 152 U. S. 284, 14 Sup. Ct. 598, 38 L. ed. 443, the court said:

> "But it is well settled that, in respect to the public lands, within, at least, common granted or primary limits, priority of grant, not priority of location, determines the question of ownership, as between parties claiming the same lands under different grants." (P. 298, 152 U. S.).

See also:

Kans. Pac. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. ed. 1122;

Bardon vs. N. P. Ry. Co., 145 U. S. 535;

Whitney vs. Taylor, 158 U. S. 85, 15 Sup. Ct. 796, 39 L. ed. 906;

Hastings Ry. Co. vs. Whitney, 132 U. S. 357;

Northern Lbr. Co. vs. O'Brien, 204 U. S. 190, 27 Sup. Ct. 249, 51 L. ed. 438;

St. Paul Ry. Co. vs. N. P. Ry Co., 139 U. S. 1, 11 Sup. Ct. 389, 35 L. ed. 77;

Newhall v. Sanger, 92 U. S. 761, 23 L. ed. 769;

N. P. Ry Co. vs. Delacey, 174 U. S. 622, 19 Sup. Ct. 791; 42 L. ed. 1111.

3. *Land Decisions.*

The views just expressed with respect to the operative ef-

fect of the Treaties of 1863, 1864 and 1867 are in harmony with those of the Interior Department as set out in State of Minnesota, 27 L. D. 418, and Rutledge vs. State of Minnesota, 37 L. D. 397. The first of these decisions, rendered in 1898, was as to Minnesota's right to swamp lands in the four ceded townships in the White Earth Reservation; and the second, rendered in 1909, as to Minnesota's right to swamp lands in the Enlarged Leech Lake Reservation. Minnesota's right as against the contention, among others, that the treaties of 1863, 1864 and 1867 operated to defeat the grant, was sustained in each decision; and based on these decisions, the lands in question were patented to Minnesota. Twenty-five years after the rendition of the first of these decisions, and fourteen years after the rendition of the second, the Government instituted this suit. It advances, as one of its contentions, the contention that these treaties operated to defeat the grant. It is our contention that the decisions are correct as a matter of law; but should doubt exist as to this, it is submitted that at this late date these decisions should be followed, particularly in view of all that has been done in reliance thereon; in other words, that the doctrine of practical construction should be invoked.

4. *Was the swamp land grant revocable even by Congress?*

The foregoing has been submitted to a certain extent on the assumption that Congress has power to revoke a grant such as the one herein involved, one *in praesenti*. There is authority to the effect that such a grant is irrevocable even by Congress. We call attention to the case of Rice v. Railroad Co., 66 U. S. (1 Black) 358, where the court said:

> "But the determination of that question in the negative does not necessarily show that the plaintiff is entitled to prevail in the suit, because, if the legal effect of the act of Congress set up in the answer was to grant to the

> Territory a beneficial interest in the lands [as distinguished from a naked trust, see p. 373, 66 U. S.], then it is equally clear that it was not competent for Congress to pass the repealing act, and divest the title; * * *" (P. 373-4, 66 U. S.)

The plaintiff advances the belief, on page 67 of its brief, that the swamp land grant gave no greater rights than did acts relating to grants of school lands. The two are wholly different: the former is a grant *in praesenti*, while the latter are merely promises to make a grant in the future after the lands have been surveyed and identified if they are then available for such purpose.

VI.

The lands in question did not pass to the United States as a result of cessions made pursuant to the Nelson Act (25 Stat. 642), for disposition for the benefit of the Indians or otherwise.

We have just argued that the Treaties of 1863, 1864 and 1867 did not operate to defeat the grant of the lands in question made to Minnesota by the Act of 1860. The Indians did not acquire title to these lands under these treaties. The Nelson Act provided for a cession by the Indians "of all their title and interest in and to" lands in Minnesota. Pursuant thereto, the Indians made cessions to the United States. The cessions conveyed to the United States such title as the Indians had—nothing more. They did not have title to the lands here in dispute, and as a consequence the United States did not acquire, by the cessions, title to such lands, in trust for the benefit of the Indians or otherwise. Assuming, for the sake of argument, that the Indians acquired some interest in the lands, such interest was subject to the grant to Minnesota, for this grant was made prior

to the acquisition of any interest by the Indians; and such interest was extinguished upon issuance of patents to Minnesota, for thereupon the title of the state became perfect and related back to the date of the grant.

VII.

Miscellaneous Contentions Considered.

1. *Diversion of Proceeds Derived from Sale of Swamp Lands.*

Plaintiff contends:

> "If the State originally acquired any rights, inchoate or otherwise, she had forfeited them as to these lands long before any patents issued by a constitutional amendment tying the hands of her legislature and irrevocably diverting the swamp lands and their proceeds from the express purpose for which they were given her by the United States. After the patents issued she again forfeited the lands by actually diverting all the proceeds of these very lands from that purpose." (Page 79, Plaintiff's Brief.)

This contention is answered by the cases of

Emigrant Co. v. County of Adams, 100 U. S. 61, 25 L. ed. 563;

Mills Co. v. Railroad Cos., 107 U. S. 557, 2 Sup. Ct. 654, 27 L. ed. 578;

Hager v. Reclamation District, 11 U. S. 701, 4 Sup. Ct. 663, 28 L. ed. 569;

United States v. Louisiana, 127 U. S. 182, 8 Sup Ct. 1047, 32 L. ed. 66;

King County v. Seattle School District, 263 U. S. 361, 44 Sup. Ct. 127, 68 L. ed. 339.

In the case of United States v. Louisiana the court said:

> "Under the Act of 1850 the swamp lands are to be conveyed to the State as an absolute gift, with a direction that their proceeds shall be applied exclusively, as far as necessary, to the purpose of reclaiming the lands.

> The judgment of the State as to the necessity is paramount, and any application of the proceeds by the State to any other object is to be taken as the declaration of its judgment that the application of the proceeds to the reclamation of the lands is not necessary. By the 2d section of the Act of 1855, it is provided that the purchase money received by the United States for the swamp lands sold by them shall be paid over to the State. There is nothing in these provisions of the character of a property trust, and nothing to prevent the application, by the State, of the swamp land fund to general purposes. If the power exists anywhere to enforce any provisions attached to the grant, it resides in Congress, and not in the court." (P. 191, 127 U. S.).

In the case of King County vs. Seattle School District, the court, speaking through Mr. Justice Butler, said:

> "But, assuming the moneys paid over to the state are charged with a trust that there shall be expended annually one half for schools and one half for roads, the appellee has no right to enforce the trust. Congress alone can inquire into the manner of its execution by the state." (P. 364, 263 U. S.).

Minnesota has, by devoting other funds and adopting other means for the reclamation of swamp lands, determined that the lands themselves and their proceeds are not needed for that purpose. This she had a right to do; and under the rule laid down in United States v. Louisiana, supra, there is no breach of the Act of 1850.

2. *Estoppel.*

Plaintiff's attempt to invoke the doctrine of estoppel against Minnesota must fail; this for the reason that essential elements of estoppel are missing. If estoppel is invocable against any

party to this suit, it is invocable against the United States.

Congress granted the lands to Minnesota in 1860. In 1861 and 1862 negotiations were carried on between the Secretary of the Interior and Minnesota, resulting in an election by Minnesota to abide by the field notes of the Government surveys as determinative of the character of the lands whether swamp or otherwise. Following this, the Secretary of the Interior negotiated the treaties of 1863, 1864 and 1867; and later on the Nelson Act was passed and cessions made thereunder for the purposes therein stated. Plaintiff contends that Minnesota is estopped to assert any claim to the lands in question because she did not "speak out and make known" her claim when the treaties were in the making and the Nelson Act was pending in Congress.

It is elementary that before one can be estopped by silence, he must know of the things that require him to speak. Minnesota knew nothing about these treaties or the negotiations which resulted in the consummation thereof until everything had been closed between the United States and the Indians, and then only constructively. Knowledge of the negotiations and what occurred thereat on the part of Minnesota seems to be predicated on the thought that "The state was an integral part of the United States, which was making those provisions, yet she stood by in absolute silence and saw the Indians give up other and very valuable lands for the lands restored; saw the United States give its solemn pledge that all the lands within the boundaries of the tracts so restored should be Indian reservation lands, etc." (Page 75, Plaintiff's brief). To assert that knowledge of things done by the United States is to be imputed to a state because the state is an "integral part of the United States" is wandering very far afield, especially when the assertion is advanced in support of the application as against the State of the equitable doctrine of estoppel. There was no knowledge on the part of Minnesota of the negotiations in question, and by reason thereof

there can be no estoppel; for without such knowledge, how was Minnesota to know that it should "speak out" in assertion of its rights.

Estoppel is claimed by reason of silence. Silence, to work an estoppel, must result in the concealment of something. What did Minnesota, by her silence, conceal? The only thing possible was her right to swamp lands under the Act of 1860. Was the United States ignorant of this act when it made the treaties in question and when the Nelson Act was passed? The answer to this question must be in the negative. The Act of 1860 was of its own enactment; it stood on its own statute books; it constituted a part of its own published records. Its officer, the Secretary of the Interior, who negotiated the treaties and cessions, was the officer entrusted with the duty of administering the Act of 1860. Before the making of the first treaty in 1863 he had agreed with Minnesota on a plan to be followed in identifying swamp lands within her borders. It seems too clear to admit of any controversy that the so-called silence of Minnesota did not operate to conceal from the United States its right to the lands. The United States was fully cognizant at all times of this right. It negotiated with the Indians and made deals with them in utter disregard of the right of Minnesota, notwithstanding full knowledge with respect thereto. Now it asserts that Minnesota is estopped to lay claim to the lands because of silence. The silence concealed nothing, and the doctrine of estoppel cannot therefore be invoked. And the United States, as between the Indians and Minnesota, throughout the negotiations in question was the guardian of the Indians; so, as between the Indians and Minnesota, in what better position are the Indians than the United States when it comes to a consideration of the invocability of the doctrine of estoppel as against Minnesota? We submit, no better.

Estoppel is invocable with respect to silence only where

there is silence as to a pertinent and important fact. In the matter before us it cannot be contended for a moment that Minnesota concealed from anyone a single fact. All facts were known to the Federal Government. Any statement by Minnesota as to its claim to the lands in question could not have added one fact to those that were already disclosed by the records of the Federal Government.

The Government claims that Minnesota should have raised her voice in protest when the treaties were in the making. Minnesota could have done this only through one of her officers. The negligence or omissions of public officers as to their public duties will not work an estoppel against the state. But no such duty was imposed upon any officer of the state; and so far as the United States and the Indians were concerned, it was not incumbent upon any officer to protest, for the reason, if for no other, that no officer was given an opportunity to do so. To make silence of a party operate as an estoppel, the circumstances must have been such as to render it his duty to speak, and there must have been an opportunity to speak. There was neither duty nor opportunity to speak in the situation before us. The lands were granted to Minnesota by the Congressional Act of 1860. Was it thereafter incumbent upon Minnesota to watch every move of the Federal Government to see that nothing was done adversely affecting the grant? Should it have had agents in Washington specially charged with the duty of spying on the Secretary of the Interior, so that, should he make a move deemed detrimental to the interests of the state, the state might "speak out and make known" its claim? The Act of 1860 denoted by its terms a present grant. Was that not enough to justify Minnesota in the belief that the grant was secure? She had already entered into an agreement with the Secretary of the Interior to abide by the field notes of the Government surveys as determinative of the lands to which she would be entitled. In view of

this, did she not have a right to assume that the agreement would be respected and that she would get all lands shown to be swamp by the field notes? Did she not have a right to assume that the Secretary of the Interior would not give or attempt to give, so soon after the grant and the making of this agreement, swamp lands to someone else without notifying her of the contemplated move, and without giving her an opportunity to be heard? The United States in negotiating these treaties led the Indians to believe, according to plaintiff's brief, that they would obtain title to the lands in question. Minnesota was given no notice of these negotiations; was given no opportunity to be heard. She was treated as an outsider, as a total stranger to the negotiations. She knew nothing about them, and was under no duty or obligation to know anything about them. And now the Government asserts that Minnesota can make no claim to the lands because she was silent during the making of these treaties. It is self-evident, it seems to us, that estoppel cannot be invoked, under the circumstances, against Minnesota, either in behalf of the United States or in behalf of the Indians.

There was nothing in the Nelson Act to arouse suspicion. In fact, it seems to have been worded by the author with the grant of swamp lands to Minnesota in mind. It provided for negotiations with the Indians, looking toward a cession by them "of all their title and interest in and to" lands in Minnesota. It is difficult to see how the language could have been improved upon had Minnesota been present during the pendency of the legislation in Congress, insisting that nothing be done adversely affecting the grant of swamp lands to her.

If estoppel is invocable at all in this case, it is invocable in behalf of Minnesota against plaintiff. Congress made a grant to Minnesota in 1860. In 1861 and 1862, the Secretary of the Interior induced Minnesota to agree to abide by the field notes of the Government surveys. In 1863, 1864 and 1867, the Secre-

tary of the Interior negotiated treaties with the Indians leading them to believe, according to plaintiff's brief, that they were getting all lands within certain boundaries. It is said that in the negotiations following the Nelson Act of 1889 the Indians were led to believe that all lands within the reservations involved were to be sold by the United States for their benefit. The lands were thereafter surveyed by the Government with resultant disclosures of the swamp lands in question. Following these surveys, Minnesota, by reason of her election to abide by the field notes, was given her first opportunity to lay claim to these lands; and she took advantage of the opportunity, with the result that the Government patented the bulk of them to her. This was done only after hearings before the Secretary of the Interior; and only after a full consideration of practically every point the Government makes in this suit in an attempt to secure a recovery against Minnesota. Following the issuance of these patents, the Government stood by while Minnesota spent many thousands of dollars in the handling of these lands; stood by while Minnesota sold the bulk of the lands, placing the proceeds of the sale beyond recall pursuant to a constitutional amendment adopted in 1881; stood by while Minnesota spent millions of dollars in improving these lands; and now, many years after all these transactions, comes forth with the claim that it erred in patenting the lands to Minnesota and asks for a recovery from Minnesota of the value of the lands sold by her and a cancellation of patents to lands not yet sold. We say that if a course of action and conduct ever furnished the basis for the invocation of the doctrine of estoppel, we have such a course of action and conduct in this case. If the United States were an individual, manifestly the doctrine would be invoked against it; perhaps it is anyway, for, as said in plaintiff's brief:

> "It may not here be said that the principle of estoppel does not apply to the sovereign. The United States was

> a sovereign; the Indian tribe was recognized as so far sovereign that treaties and collective agreements might be made with it. The state, too, was a sovereign; and as beween self-respecting independent sovereigns, at least, an estoppel growing out of such conduct would be enforced in the last resort by war, if there was no tribunal competent to declare an enforcement." (Page 76, Plaintiff's Brief.)

3. *Equities.*

Plaintiff contends that the equities are overwhelmingly in favor of the Indians. This might be true were the controversy one between the Indians and the United States. As to Minnesota the contention is without the slightest merit.

Plaintiff reviews rather exhaustively negotiations carried on between the Government and the Indians and contends that these show many instances of the practice of deceit and fraud by the Government upon the Indians. These, it is said, establish equities in favor of the Indians and against Minnesota.

Reference is made to the Treaties of 1847 (9 Sta. 908) and 1848 (9 Stat. 952), and it is asserted that the Government breached faith with the Indians relative thereto. It is contended that the Indians were not treated fairly during the negotiations leading up to the Treaty of 1855. Attention is called to the building of dams by the Government at Leech, Cass and Winnibigoshish Lakes, with resultant loss to the Indians of their gardens, rice fields, hay crops, grave yards, etc.; and breach of faith is charged because the Indians were not consulted prior to the construction of these dams. It is said that the Government failed to pay annuities provided for by certain of the treaties, at least not until 1890. Assuming all that plaintiff says with respect to these matters to be true, on what possible theory can it be argued that equities exist by reason thereof in favor of the Indians against Minnesota? The Treaties of 1847 and 1848 were made and the negotiations resulting in the Treaty of 1855

occurred before Minnesota had become a state. As to all of the aforementioned dealings with the Indians, Minnesota had absolutely nothing whatsoever to do. If equities exist by reason thereof, they exist in favor of the Indians against the United States, but not against Minnesota.

With respect to the Treaties of 1863, 1864, 1867 and the Nelson Act, plaintiff, at pages 40 and 41 of its brief, says:

> "From the foregoing narrative it is abundantly demonstrated that the United States, by the treaties of 1863-4 and 1867, stipulated in absolute and unqualified terms that all the lands within the boundaries of the enlarged Leech Lake and the White Earth reservations were set aside for the Indians; and that in the agreement under the Nelson Act it again solemnly stipulated that all the land then ceded from those and other reservations should be disposed of for the benefit of the Indians, with the single exception above stated. When, therefore, the officials of the Government patented the swamp lands to the State, it was in direct violation of solemn treaty engagements, a breach of faith which at this late day the United States in this suit seeks to repair and make good. It was a breach of faith, whether the United States promised what it had power to perform and did not, or whether through ignorance of the law or thoughtless indifference it made promises it could not perform, because the swamp lands had already passed beyond its control."

If it be true that the Government led the Indians to believe that the Treaties of 1863, 1864 and 1867 operated to give them title to all lands within the boundaries of the reservations created thereby, and that all these lands would be sold under the Nelson Act for their benefit, the Government misled them. Representations impossible of fulfillment were made. This was later recognized when the Government patented the lands in question to Minnesota. But plaintiff argues, conceding all this, that the Government breached faith with the Indians in patenting the

lands to Minnesota. Why should this breach of faith be charged against Minnesota; and how can it be set up as an equity in favor of the Indians against Minnesota? Minnesota made no representations of any kind to the Indians; had nothing to do with the Indians. Transactions with the Indians were all carried on by the Government. Minnesota was a stranger to the whole business. All she did was to lay claim to the lands and prosecute her case before the Interior Department. The result was the issuance of patents to her. There is no charge of bad faith or fraud on the part of Minnesota. Minnesota acted in entire good faith and proceeded in the customary way with respect to securing patents to the lands. The failure of the Government to make good its representations to the Indians establishes an equity in favor of the Indians against the Government, but manifestly, not against Minnesota.

The government's case on the merits upon final analysis amounts simply to this: The United States led the Indians to believe, during negotiations leading up to the making of the treaty of 1867, that they were to acquire under that treaty all lands included within the boundaries of the reservations created thereby; and in the negotiations following the Nelson act that all these lands, save those withheld for allotment purposes, were to be sold under that act for their benefit. Later the United States breached faith with the Indians by patenting some of the lands, though swamp in character, to Minnesota. Faith was breached because the United States had made promises which she was unable to carry out; she had granted the lands to Minnesota prior to the making of these promises. The United States, as stated in her brief, is prosecuting this suit to right the wrong done the Indians. It is impossible for us to see just why Minnesota, an innocent bystander, should respond to the Indians in damages or otherwise for the wrong perpetrated upon them by the United States. We submit that the wrong should be

remedied by the one responsible therefor, the United States.

CONCLUSION

It is respectfully submitted that the bill should be dismissed on the ground that the court is without jurisdiction to entertain the suit; and, if not on that ground, then on the ground that the suit is without merit.

If, however, the bill is not dismissed, then the state submits that the damages awarded for lands sold by the state must be limited to $1.25 an acre, and damages for timber to the value of that timber as of the time of the cession by the Indians under the Nelson Act. This principle is established by the case of United States v. Mille Lacs Band of Chippewa Indians, 229 U. S. 498, where the court says:

> " * * * It is well to observe that the damages should be assessed on the basis of the prices which would have been controlling had the act of 1889 been rightly applied." (P. 510, 229 U. S.).

The United States had power to sell the timber immediately after the cession by the Indians under the Nelson act. It cannot be presumed that it would have delayed such sale until the time when Minnesota sold the timber, after patents to her. Any damage based on an increase in value of the timber, after the accrual of the right of the Government to sell it, must therefore be purely speculative. The only possible basis in law for the ascertainment of that damage is the value of the timber at the time of the cession.

CLIFFORD L. HILTON,
Attorney General of Minnesota.
G. A. YOUNGQUIST,
Assistant Attorney General of Minnesota.
MONTREVILLE J. BROWN,
Solicitors for Defendant.

CHARLES R. PIERCE,
of Counsel.

APPENDIX

"The grant thus made to Minnesota and Oregon has been held to be a present one. (Decision of the Department, State v. Stott, et al., and State v. Preemptors, supra, December 4, 1877; Copps L. O. p. 149, January 1878; and Gaston v. State, 5 Oregon, 59).

"The grant of 1850 had been treated as a present one, and generally understood to be such long prior to 1860.

"In extending the grant to Minnesota and Oregon, Congress knew perfectly well it was thus sustaining a grant in praesenti."

Crawley v. Oregon, 7 Copp's L. O. 28 (1880).

"March 27, 1926 (22 L. D., 388), the Department rendered a decision adverse to the claim of the State to swamp lands in the Red Lake reservation, without therein passing upon its claim to such lands in the White Earth reservation.

"The Department is in receipt of your office letter of April 30, 1898, calling attention to the fact that your office is not able to take any action in reference to opening or offering for sale the lands in the four ceded townships of the White Earth reservation, under the act of January 14, 1889 (25 Stat., 642), because of the pendency before the Department of the State's claim to swamp lands therein.

"It is shown by the letter of the Commissioner of Indian Affairs dated June 20, 1894, and by the letter of your office dated March 6, 1896, that the four townships of the White Earth reservation now in question were unappropriated public lands, free from any Indian claim, at the date of the swamp land grant to Minnesota, March 12, 1860 (12 Stat., 3), and that they were reserved for the benefit of the Indians under the treaties of May 7, 1864 (13 Stat., 693), and March 19, 1867 (16 Stat., 719).

"The question arises whether, after the date of the

swamp land grant to the State, these lands could be lawfully reserved by the United States and disposed of for the benefit of the Indians, so as to defeat the swamp land grant.

"The act of March 12, 1860, extended the provisions of the act of September 28, 1850 (9 Stat., 519), to the States of Minnesota and Oregon, subject to the exceptions contained in the following proviso to the act of 1860.

" 'Provided, That the grant hereby made shall not include any lands which the government of the United States may have reserved, sold or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act.'

"The state calls attention to various judicial interpretations of the act of September 28, 1850, granting swamp and overflowed lands to the State of Arkansas (9 Stat., 519), in which by the courts and by the Department it has been held that said grant was a present one, and prevented other disposition of lands of this class, after the date of the grant. That such is the construction placed upon said act is conceded, and no discussion of the cases cited by the State seems necessary.

"If the act of 1860, notwithstanding its proviso, receives the same construction as the act of 1850, the proviso will be rendered nugatory and of no effect. This would violate well established rules of interpretation, and would defeat the will of Congress as expressed in the proviso.

"Construing the act of 1850, and the act of 1860, together as one act of the latter date, it would still be a grant in presenti of all swamp lands in the State, excepting those reserved, sold or disposed of by the United States, in pursuance of a law theretofore enacted, prior to confirmation of title under the swamp land grant.

"Was the reservation of these four townships made before the confirmation to the State of title under the swamp land grant? The issuance of patent is the final

and only act of confirmation of title under the swamp land grant, and as no patent has yet issued for any of these lands it follows that the reservation was made before the title of the State to any of the lands therein was confirmed.

"Were these four townships reserved in pursuance of any law enacted prior to the act of 1860? As before stated, they were unappropriated lands at that time and were subsequently reserved by the treaties of 1864 and 1867. Those treaties do not purport to have been made in pursuance of any prior law nor do they purport to have followed any prior law in providing for the reservation of these lands. While statutes are sometimes enacted providing for or looking toward the negotiation of a treaty, the authority of the President and Senate in negotiating and ratifying treaties is not dependent upon the existence of any such statute, and the treaties when made become effective and of force not by reason of any statute theretofore enacted, but by reason of the action of the President and Senate in adopting them. The act of December 19, 1854 (10 Stat., 598), 'to provide for the extinguishment of the title of the Chippewa Indians,' etc., in pursuance of which your office suggests that these treaties were negotiated and these lands reserved, did not contemplate the creation of a reservation such as the White Earth reservation. It provided for securing an extinguishment of the Chippewa title to lands in Minnesota and Wisconsin, one of the terms of which extinguishment was to be:

granting to each head of a family, in fee simple, a reservation of eighty acres of land, to be selected in the territory ceded, * * * which said reservations shall be patented by the President of the United States.

"This act thus contemplated eighty acre reservations in the nature of individual allotments in fee simple to be patented to the heads of families and held by them in severalty, but it contained no reference to the creation of a reservation of any other character. The treaties of 1864 and 1867 made no provision for small or eighty acre reservations or allotments of ceded lands to be patented

and held in severalty, but did provide for a single resercation embracing a large area of land to be held by the Indians as a tribal reservation. Under these circumstances it can not be said that the White Earth reservation, embracing these four townships, was established in pursuance of the act of 1854 or of any other law enacted prior to the swamp land grant to Minnesota. These four townships being unappropriated public lands at the date of that grant were subject to disposal by Congress, and upon the passage of the act of March 12, 1860, the right of the State attached to all the swamp lands therein, subject alone to the exceptions made in the proviso to that act and, as hereinbefore shown, the reservation subsequently made for the benefit of the Indians does not come within those exceptions.

"The subsequent act of January 14, 1889 (25 Stat., 642), does not come within the terms of the proviso and can not defeat the prior grant to the State of the swamp lands in these townships, so it follows that the lands in said townships can only be disposed of according to the act of 1889, after eliminating the swamp lands therefrom.

"Your office is directed to take the necessary steps to eliminate from the other lands in the townships named such lands as were swamp or overflowed at the date of the swamp land grant to the State of Minnesota, and to that end you will notify the State that its right to such lands is recognized, and a reasonable time will be allowed it to make its selections, subject to the approval of your office, after the expiration of which time your office will proceed to dispose of the residue of the lands in said townships in accordance with the provisions of the act of January 14, 1889."

State of Minnesota, 27 L. D. 418. (1889).

"This department has held so frequently that reference to authority is unnecessary that the Act of September 28, 1850, was a present grant, vesting in the state from the day of its date the title to all the swamp and over-

flowed land then not sold and requiring nothing but the determination of boundaries to make it complete. That being true it is evident that the Act of March 12, 1860, supra, is of the same character, and from the date of its passage vested in the state of Oregon the title to all the swamp lands within its limits. It follows, therefore, that the lands in question, being evidently of that character, passed to the state under that grant, and hence could not have been passed under the agricultural college grant of July 2, 1862, supra."

State of Oregon, 23 L. D. 460 (1896).

"The Act of March 12, 1860, supra, was a present grant, and operated to transfer, as of that date, to the state of Minnesota, all of the swamp and overflowed lands in the state rendered thereby unfit for cultivation, it only being left to identify the lands granted."

State of Minnesota, 32 L. D. 65 (1903).

"The uniform holding of the supreme court has been that the swamp land grant was one in praesenti of all land then of the character granted, lacking only identification to complete the right of the state to the land so granted.

"This construction is the one unvaryingly adhered to by the court from its decision in Railroad Company v. Fremont County (9 Wall. 89), to the present time, in many fully-considered decisions, and is not longer subject of doubt or question. Upon similar facts, in State of Minnesota (27 L. D. 418), the department held that swamp lands within the White Earth reservation passed to the state under its grant.

"Title having passed to the state by the grant, the subsequent reservation did not affect the state's right, though it might delay the identification of the granted

land. When such identification is made, the right of the state becomes complete.

"I am therefore of opinion that upon the facts presented lands swamp and overflowed and unfit thereby for cultivation, not reserved or granted by the United States, March 12, 1860, passed to the state by its grant, and as property of the state are excepted from the provisions of the Act of January 14, 1889. This does not include sections sixteen and thirty-six (see opinion of this date involving status of the four ceded sections in the White Earth reservation)."

State of Minnesota, 32 L. D. 328. (1903).

"The question presented is: When does the title of the state become 'confirmed' within the meaning of the act, so that its right is established to receive legal title by issue of a patent? This must be determined by the character and terms of the grant. That the swamp land grant was a grant of title in praesenti, as of the date of the act, of all lands then of that character, has been so clearly and unvaryingly held as not to require citation of authority. But such grant being indeterminate as to the description and identification of the particular lands it was provided that lands disposed of pursuant to any law theretofore enacted, prior to confirmation of the title under this act, should be excepted from its operation."

State of Oregon, et al., v Frakes, 33 L. D. 101 (1904).

"The land involved herein was ceded to the United States by the Chippewa Indians by the treaty of February 22, 1855 (10 Stat., 1165), and included within the exterior boundaries of the tract subsequently reserved for said Indians by the treaties of May 7, 1864, proclaimed March 20, 1865 (13 Stat., 693), and March 19, 1867 (16 Stat., 719.) It was selected May 29, 1905, in Minnesota Swamp Land List No. 154."

* * *

"While the appeal contains a number of specifications of error, it is necessary to consider only the following, as their determination must control the conclusion to be reached herein.

"First: That all the treaties and proceedings looking to the disposition of these lands were made pursuant to the law of December 19, 1854 (10 Stat., 598), and the said lands were, therefore, excepted from the operation of the swamp land act.

"Second: That the swamp land act lapsed and became of no effect, as to the land involved, because the State failed to claim or select the same within the time specified in the act.

"Third: That the State of Minnesota ratified the act of the United States in disposing of the lands involved by the treaties of 1864 and 1867, supra, and confirmed said acts; that the State, having received the benefits of said acts, is estopped to deny their full force and effect.

"The land in question having been ceded by the Chippewa Indians to the United States by the treaty of 1855, supra, and thus being clearly public land of the United States at the date of the passage of the act of March 12, 1860 (12 Stat., 3), if swampy in character, passed to the State by virtue of its grant, unless excepted therefrom by the terms of the grant itself.

"The appellant claims that the swamp land act contains two provisions, both of which serve to except the land involved from the operation of the grant: first, the government has reserved or made other disposition of the land, within the meaning of the proviso to the first section of the act of 1860; and, second, that the land was not selected within two years after survey.

"These questions have been heretofore specifically considered by this Department and a conclusion reached contrary to the appellant's contention. In the case of the State of Minnesota (27 L. D. 418), it was plainly held that the treaties of 1864 and 1867 were not made in pursuance of the act of 1854, and that the act of January 14, 1889 (25 Stat., 642), which provides for the disposition of these lands, does not come within the

terms of the proviso, and cannot defeat the prior grant to the State. See also 32 L. D., 328, and 2 Copp's Public Land Laws, 1081."

* * *

"The effect of the proviso respecting the making of selections within two years after survey, was most carefully considered by this Department during the year 1906, upon a question presented by the Secretary of Agriculture, and, in view of the importance of the matter, the question was referred to the Attorney-General for his opinion. On June 15, 1906, the Attorney-General advised this Department that the proviso in question was not a condition or limitation of the grant, but merely a direction to the Secretary of the Interior. (See 25 Opinions Attorney-General, 626).

"It will be observed that this opinion supports the views expressed by Secretary Schurz in a communication addressed to the Commissioner of the General Land Office on December 4, 1877 (2 Copp's Public Land Laws, 1081)."

Rutledge v. State of Minnesota, 37 L. D. 397 (1909).